Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

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GLENN ALLEN ADAIR DBA
SUPER D 229, *et al.*,
*Petitioners*,

v.

LEASE PARTNERS, INC., *et al.*,
*Respondents*.

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

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## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

12 U.S.C. §1819(b)(2) provides that "all suits of a civil nature" to which the FDIC "*is* a party" shall be "deemed to arise under" federal law, thus giving a United States District Court federal question jurisdiction of such suits. The suit at bar was removed to United States District Court, with jurisdiction based on 12 U.S.C. §1819(b)(2). The FDIC, as well as all Plaintiffs who had asserted claims against the FDIC, were subsequently dismissed, leaving only defendants wholly unrelated to the FDIC facing pendent state law claims asserted by Petitioners. The District Court exercised its discretion to remand the claims to state court. The Fifth Circuit held that the District Court continued to have federal question jurisdiction over those state law claims by virtue of 12 U.S.C. §1819(b)(2), the practical effect being that the District Court had no discretion to remand.

The question presented is this: Did the Fifth Circuit err in holding, contrary to this Court's reasoning in *Carnegie-Mellon University v. Cohill*, 484 U.S. 343, 348, 108 S.Ct. 614, 618 (1988) and contrary to decisions of the Second, Third, Eighth, Ninth and Tenth Circuits, that 12 U.S.C. §1819(b)(2) strips the District Court of its discretion to remand pendent state law claims against parties unrelated to the FDIC, even after the FDIC is dismissed?

## PARTIES TO THE PROCEEDING IN THE FIFTH CIRCUIT AND 29.6 STATEMENT

The Petitioners, appellees in the Court below, are:

Glenn Allen Adair d/b/a Super D #229

Jim Bain

Jim Bain's Pharmacy, Inc.

William J. Bell, Jr.

Macon City Drug, Inc. d/b/a City Drug Store

Charles Best d/b/a Martens Drug Store

Charles Boggan

Decatur Drugs, Inc. d/b/a Wheeler Drug Store

Billie James Bonner d/b/a Bonner's Pharmacy

Randy Calvert

Brent's Drugs, Inc.

Dwight Carr d/b/a Carr's Discount Drugs

Kenny G. Coleman d/b/a Coleman's Health Mart Pharmacy

Ann Devoe

Gathright-Reed Drug Company, Inc.

Michael E. Duran

Nana's, Inc. d/b/a Duran Drug Company

James E. Gable

Southern Drug Store, Inc. d/b/a Southern Drug

Lawrence Holden

Pearl River Drug Company, Inc.

Richard Hunt

Mr. Discount Drugs of Forest, Inc.

James L. Jelks, Jr. d/b/a Centreville Drugs

Donald G. Kitchens

Wilson Drug Company of Corinth, Inc. d/b/a Kitchens Drug

Super Sav-On Drugs of America, Inc.

Timothy L. Liddy d/b/a Liddy's Healthmart Pharmacy

James A. May

May's Pharmacy, Inc. d/b/a May's Pharmacy and d/b/a Coldwater Pharmacy

Robert L. Mays d/b/a Ripley Drug Company

Larry Melton d/b/a Ashland Discount Drug

None of the foregoing Petitioners who are corporations have any parent corporations. No publicly held corporation owns 10% or more of the stock of any of the Petitioners who are corporations.

The Respondents, appellants in the Court below, are:

BancorpSouth Bank, f/k/a Bank of Mississippi d/b/a First Continental Leasing and Volunteer Bank

Lease Partners, Inc.

First Bank Richmond, N.A., f/k/a First Bank Richmond, S.B., d/b/a First Federal Leasing

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## PETITION FOR A WRIT OF CERTIORARI

## OPINIONS BELOW

The opinion of the Fifth Circuit Court of Appeals is reported at 587 F.3d 238. (Pet. App. 1a-15a). The opinion of the United States District Court for the Southern District of Mississippi is reported at 566 F.Supp.2d 518 (*Id.* at 18a-30a).

## JURISDICTION

The judgment of the Court of Appeals was entered on October 28, 2009. (Pet. App. 1a). Petitioners' timely petitions for rehearing and rehearing en banc were denied on December 18, 2009. (*Id.* at 16a-17a).

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, Section 2, Clause 1 of the United States Constitution provides in pertinent part:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . .—to Controversies to which the United States shall be a Party; . . . .

Title 12, Chapter 16 of the United States Code, addresses the nature of civil actions in which the Federal Deposit Insurance Corporation (the "Corporation" or "FDIC") is a party, and provides in pertinent part at **12 U.S.C. §1819(b)(2)(A)**:

> (A) In general
>
> Except as provided in subparagraph (D), all suits of a civil nature at common law or in equity to which the Corporation, in any capacity, is a party shall be deemed to arise under the laws of the United States.

Concerning removal by the FDIC, **12 U.S.C. §1819(b)(2)(B)** provides:

> (B) Removal
>
> Except as provided in subparagraph (D), the Corporation may, without bond or security, remove any action, suit, or proceeding from a State court to the appropriate United States district court before the end of the 90-day period beginning on the date the action, suit, or

proceeding is filed against the Corporation or the Corporation is substituted as a party.

Concerning supplemental jurisdiction, **28 U.S.C. §1367(a)** provides:

> (a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

Concerning the District Court's discretion to decline to exercise supplemental jurisdiction, **28 U.S.C. §1367(c)** provides:

> (c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if—
>
> (1) the claim raises a novel or complex issue of State law,
>
> (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
>
> (3) the district court has dismissed all claims over which it has original jurisdiction, or
>
> (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

Concerning the District Court's discretion to remand, **28 U.S.C. §1441(c)** provides:

> Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates.

## STATEMENT OF THE CASE

This case concerns whether the District Court had discretion to remand to state court after the claims giving rise to the court's original removal jurisdiction were dismissed.

The facts necessary for resolution are not complicated. This is a state law fraud, negligence, breach of contract and usury action brought by a number of Mississippi pharmacies, pharmacists, veterinarians and veterinary clinics against several finance companies and individual salesmen relating to the purchase of electronic advertising boards and kiosks. (Pet. App. 2a). Petitioners commenced this action in 1996 in Mississippi state court after learning that the purchase transactions were part of a huge pyramid or Ponzi scheme in which the finance company defendants were knowing participants. (*Id.* at 2a, 22a). Each Plaintiff asserted claims only against the particular finance company and salesman responsible for that Plaintiff's purchase transaction. (*Id.* at 19a). Though each Plaintiff's transaction was separate from the other Plaintiffs' transactions, the Plaintiffs joined together in this single action against a number of finance companies because the salesmen made the

same misrepresentations to all of the Plaintiffs.[1] (*Id.* at 2a).

After a long procedural history involving years in multidistrict litigation, two lengthy bankruptcies, a previous discretionary remand order affirmed by the Fifth Circuit, and two interlocutory appeals to the Mississippi Supreme Court, this case was finally set for trial in November, 2007. (Pet. App. 22a). However, some six weeks before trial the FDIC intervened as receiver for defendant NetBank and substituted itself for NetBank.[2] (*Id.* at 18a).

The presence of the FDIC as a party changed the character of this otherwise non-removable case to one "aris[ing] under the laws of the United States" by virtue of 12 U.S.C. §1819(b)(2). The FDIC timely removed this case pursuant to the same statute. (Pet. App. 18a). Petitioners promptly moved to dismiss all claims against the FDIC because it was clear the receivership estate would have no assets from which to recover a judgment. (*Id.* at 19a). Petitioners also moved to remand to state court the non-removable claims against the remaining parties, who are all unrelated to the FDIC. *Id.* After the dismissal of the FDIC, remand was appropriate pursuant to 28 U.S.C. §1367 and 1441(c) and this Court's decision in *Carnegie-Mellon University v. Cohill*, 484 U.S. 343, 348, 108 S.Ct. 614, 618 (1988).

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[1] The vast majority of the original Plaintiffs and original Defendant finance companies have now been dismissed from this case as a result of various settlements during the course of the litigation.

[2] There is no relationship between NetBank (and hence the FDIC) and the other finance company defendants who remain in the case at this time.

The District Court dismissed both the FDIC and all Plaintiffs who had asserted claims against the FDIC. (Pet. App. 19a, 30a). Thus, the only parties remaining are Plaintiffs and Defendants who had no relationship to the FDIC or its receivership bank, NetBank. *Id.* The District Court found that its continuing jurisdiction over the remaining claims was supplemental, not original, and exercised its discretion to remand the case to state court. (*Id.* at 21a, 30a).

The Fifth Circuit had jurisdiction to review the remand order in light of this Court's recent decision in *Carlsbad Technology, Inc. v. HIF Bio, Inc.* 129 S.Ct. 1862, 1867 (2009) (circuit courts of appeal have jurisdiction to review remand orders based on a district court's exercise of discretion). The Fifth Circuit expressly found that "the district court had very good reasons for remanding." (Pet. App. 4a). However, the Fifth Circuit reversed the remand order because it held that, even though the FDIC had been dismissed, the District Court had continuing federal question jurisdiction, not supplemental jurisdiction, over all claims, and thus had no discretion to remand. (*Id.* at 12a-14a).

The question presented here is whether the Fifth Circuit erred in concluding that 12 U.S.C. §1819(b)(2) provides continuing federal question jurisdiction over all otherwise non-removable claims so as to preclude any discretion to remand even though the FDIC has been dismissed.

Two members of the Fifth Circuit Panel held that once the FDIC intervened, all state law claims against other unrelated defendants were ***permanently*** re-characterized as claims arising under federal law pursuant to 12 U.S.C. §1819(b)(2), even after the FDIC was dismissed. (Pet. App. at 12a-13a). The

third member, Judge Jolly, disagreed, finding that once the FDIC no longer is a party, the district court has discretion to remand state law claims against unrelated parties:

> The statute gives original jurisdiction to cases in which the FDIC "is a party." 12 U.S.C. §1819(b)(2)(A). The statute does not, through some feat of alchemy, make the case's state law claims federal-law claims. Nor does the text "*is* a party" mean that all state-law claims in any case to which the FDIC ever was a party continue to arise under federal law after dismissal of all federal interests.

(*Id.* at 15a). However, Judge Jolly concurred in the reversal because two federally pre-empted state law usury claims remain in the case at this time.[3] *Id.*

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[3] The district court correctly found that the usury claims did not confer removal jurisdiction because they have been pending in this case dating back to the original complaint filed in 1996 and removal had not been timely or properly based on these claims. (Pet. App. 22a, 27a). Judge Jolly cited *Laurents v. Arcadian Corp.*, No. 94-41183, 1995 WL 625394, at *2, 69 F.3d 535 (5th Cir. Oct. 4, 1995) for the proposition that these federally-preempted usury claims cannot be remanded. However, 28 U.S.C. §1447(d) precludes the Fifth Circuit from reviewing this district court finding. Moreover, Petitioners respectfully submit that *Laurents* recognizes an exception for "defect[s] in the removal procedure or circumstances rendering the retention of jurisdiction 'inappropriate.'" *Id.* This exception applies because the Defendants waived any right to remove on grounds of the usury claims long before the FDIC entered the case.

In any event, Petitioners no longer desire to assert their usury claims. Thus, in an attempt to simplify the issues, Petitioners have filed a motion to dismiss the usury claims. (Pet. App. 31a-39a). The Fifth Circuit entered an order denying the motion "at this time." (*Id.* at 40a). Petitioners hereby renew

The Fifth Circuit correctly observed that 12 U.S.C. §1819(b)(2) is silent as to "what happens to a court's jurisdiction, if anything, when the FDIC is dismissed as a party." (Pet. App. 7a). The court then applied a "time-of-filing rationale" in concluding that "federal jurisdiction continues in this case pursuant to [12 U.S.C.] §1819(b)(2)" since it admittedly existed on the date of removal. (*Id.* at 12a-13a).

In short, the two-member majority of the Fifth Circuit Panel held that purely state law claims against parties wholly unrelated to the FDIC are permanently transformed into federal law claims upon the fortuitous and short-lived substitution of the FDIC for an unrelated defendant. (Pet. App. 12a-13a). Thus, the Court concluded that the District Court had continuing original jurisdiction, not supplemental jurisdiction, over all the claims and lacked discretion to remand. *Id.*

## REASONS FOR GRANTING THE WRIT

A writ of certiorari should be granted for at least four reasons. First, the Fifth Circuit's holding that state law claims cannot be remanded after dismissal of the FDIC conflicts with the principle established in *Carnegie-Mellon University v. Cohill*, 484 U.S. 343, 348, 108 S.Ct. 614, 618 (1988), affording the district courts discretion to remand in instances where the federal interests giving rise to original removal jurisdiction have dropped out of the case.

Second, by holding that 12 U.S.C. §1819(b)(2)(A) brings within the scope of federal question juris-

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their motion that the usury claims be dismissed for the reasons stated in their formal motion. Any issue regarding these claims will be mooted upon dismissal of the claims.

diction state law claims against parties unrelated to the FDIC *even after dismissal of the FDIC*, the Fifth Circuit's decision expands the scope of "arising under" jurisdiction beyond the limits of Article III, Section 2 of the United States Constitution. The decision runs counter to this Court's holdings addressing similar issues in *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 725, 86 S.Ct. 1130, 1138 (1966) and *Osborn v. Haley*, 549 U.S. 225, 244-245, 127 S.Ct. 881, 896 (2007).

Third, the Fifth Circuit's holding that 12 U.S.C. §1819(b)(2) confers continuing original federal jurisdiction over otherwise non-removable claims, even after the FDIC is dismissed, is in direct conflict with decisions in the Second, Third, Eighth, Ninth and Tenth Circuits.

Finally, the question presented for review is important because it addresses the scope of federal courts' original jurisdiction in recurring litigation involving the FDIC. A simple Pacer search for the party name "Federal Deposit Insurance Corp" reveals that in the past ten years alone there are some 2464 entries for cases filed in which the FDIC is a party. Some 841 of those entries are for cases filed in just the past twelve months. The FDIC has predicted that bank failures will continue to rise in the near term. Thus, it is very likely that the question will continue to arise until this Court resolves the conflict among the circuits.

## I. THE FIFTH CIRCUIT'S DECISION CONFLICTS WITH THE REASONING IN THIS COURT'S *COHILL* DECISION

The Fifth Circuit's decision effectively holds that a proper removal under 12 U.S.C. §1819(b)(2) permanently extinguishes the district court's discretion to remand in every instance. The statute, however, is clear that it "is" the presence of the FDIC as a party that makes an otherwise state law claim "deemed" to arise under federal law:

> Except as provided in subparagraph (D), all suits of a civil nature at common law or in equity to which the Corporation, in any capacity, **is a party** shall be deemed to arise under the laws of the United States.

12 U.S.C. §1819 (b)(2)(A) (Emphasis added).

In his concurring opinion in the court below, Judge Jolly aptly noted there is no longer any "federal interest" in the Petitioners' state law claims once the FDIC has been dismissed and its successor is not a party. (Pet. App. 15a).

This Court has addressed an analogous situation in the context of a removal under 28 U.S.C. §1441(a), where the claims that afforded removal jurisdiction dropped out of the action. *Carnegie-Mellon University v. Cohill*, 484 U.S. 343, 357, 108 S.Ct. 614, 623 (1988). That statute, just like 12 U.S.C. §1819(b), is silent as to whether the district court is required to continue to exercise jurisdiction and does not expressly grant discretionary authority to remand pendent claims when the federal claims giving rise to removal jurisdiction are dropped from the case. *Cohill*, 484 U.S. at 353, 108 S.Ct. at 621. After reviewing the history and justification for the

doctrine of pendent jurisdiction, this Court extended the doctrine to afford district courts the discretion to remand pendent state law claims once the claims that provided removal jurisdiction have dropped out of the case. *Cohill*, 484 U.S. at 357, 108 S.Ct. at 623.[4]

A recent concurring opinion by Justice Breyer observed that "all agree" that the law grants a district court broad discretion to determine whether it should keep on its docket a case that "*once* contained federal law issues but now contains only state law issues":

> In this case, we consider a District Court's decision not to retain on its docket a case that *once* contained federal law issues but *now* contains only state law issues. All agree that the law grants the District Court broad discretion to determine whether it should keep such cases on its docket . . . .

*Carlsbad Technology, Inc. v. HIF Bio, Inc.*, 129 S.Ct. 1862, 1869 (2009).

In the instant case the state law claims against the remaining defendants are no longer federal law claims because the FDIC no longer "is" a party.[5] Petitioners respectfully submit that the Fifth Circuit decision conflicts with the principle of discretionary remand authority established in *Cohill* as well as the

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[4] Subsequent to the *Cohill* decision, Congress enacted 28 U.S.C. §1367 which provides an additional basis for authorizing remand of the remaining state law claims in this case now that the FDIC and its successor are no longer parties. *Batiste v. Island Records Inc.*, 179 F.3d 217, 227 (5th Cir. 1999).

[5] Again, the focus here is on Petitioners' state law claims. Petitioners' federally-preempted usury claims are not a factor for the reasons addressed in Note 3, above.

discretionary remand authority granted in 28 U.S.C. §1367 and 28 U.S.C. §1441(c).

## II. THE FIFTH CIRCUIT'S INTERPRETATION OF 12 U.S.C. §1819(b)(2) STRETCHES BEYOND THE CONSTITUTIONAL LIMIT ON FEDERAL JURISDICTION

The question presented is also important because the Fifth Circuit's interpretation of 12 U.S.C. §1819(b)(2) stretches federal jurisdiction beyond the limit set in Article III, Section 2, Clause 1 of the United States Constitution.

None of the Petitioners ever asserted any claims against the FDIC or its receivership bank, NetBank. None of the remaining Defendants have had any relationship with NetBank or the FDIC. NetBank was a Defendant only because Petitioners (who only have claims against other Defendants) relied on the same misrepresentations that were made to the now-dismissed Plaintiffs who had claims against NetBank arising out of the same Ponzi scheme. Petitioners' claims against the remaining Defendants arose out of transactions that simply did not involve NetBank.

Petitioners do not dispute that so long as the FDIC was a party, Congress had the power to deem the entire case as one arising under the laws of the United States. However, once the FDIC and the Plaintiffs suing the FDIC were dismissed, no rational basis exists for continuing an artificial characterization that would *require* the District Court to continue exercising jurisdiction over purely state law claims. To do so violates Article III, Section 2, Clause 1 of the United States Constitution because this is simply not a case "arising under" federal law or otherwise involving the United States.

In *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 725, 86 S.Ct. 1130, 1138 (1966) this Court observed that a "federal claim must have substance sufficient to confer subject matter jurisdiction on the court." This suggests that this Court will not hesitate to review whether it is rational to construe a statute in such a manner as to *require*[6] federal court jurisdiction over what is clearly a state law matter. There simply is no substantive federal claim pending in this case at this time under 12 U.S.C. §1819(b)(2). As Judge Jolly put it in his concurring opinion, "no federal interests remain in the case." (Pet. App. 15a).

The *Gibbs* Court went on to analyze whether a federal court can or should entertain jurisdiction over state law claims where the federal claims giving rise to the court's original jurisdiction drop out of the case. Pertinent to the instant case was this Court's statement, "Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well." 383 U.S. at 726, 86 S.Ct. at 1139.

More recently in *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 441, 115 S.Ct. 2227, 2239 (1995), a case involving federal court review of an Attorney General's certification under the Westfall Act, four members of this Court expressed the view that it may surpass the bounds of Article III's "arising under" clause to require a federal court to continue to exercise jurisdiction after all federal claims have dropped out of the case:

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[6] It is important to distinguish between the District Court's *discretion* to hear pendent state law claims versus the mandate issued by the Fifth Circuit in this case that the District Court is *required* to hear Petitioners' state law claims.

> As the principal opinion concedes, then, *ante*, at 2236, its reading supposes that Congress intended federal courts to retain jurisdiction over state-law tort claims between nondiverse parties even after determining that the Attorney General's certification (and thus the United States's presence as the defendant) was improper. But there is a serious problem, on the Court's reasoning, in requiring a federal district court, after rejecting the Attorney General's certification, to retain jurisdiction over a claim that does not implicate federal law in any way. Although we have declined recent invitations to define the outermost limit of federal-court jurisdiction authorized by the "Arising Under" Clause of Article III of the Constitution, *see Mesa v. California*, 489 U.S. 121, 136-137, 109 S.Ct. 959, 968-969, 103 L.Ed.2d 99 (1989); *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 103 S.Ct. 1962, 76 L.Ed.2d 81 (1983), on the Court's reading this statute must at the very least approach the limit, if it does not cross the line.

Other members of this Court responded that this issue need not be addressed in *Lamagno* because diversity jurisdiction existed in that case.

However, this Court did address the Article III issue in *Osborn v. Haley*, 549 U.S. 225, 244-245, 127 S.Ct. 881, 896 (2007), another Westfall Act case. The District Court rejected the Attorney General's certification and ordered the case remanded. In affirming the Circuit Court's reversal, this Court held:

> In the case before us, the [Article III] question would arise only if, after full consideration, the District Court determines that Haley in fact engaged in the tortious conduct outside the scope

> of his employment charged in Osborn's complaint. At that point, however, little would be left to adjudicate, at least as to Haley's liability. Because a significant federal question (whether Haley has Westfall Act immunity) would have been raised at the outset, the case would "aris[e] under" federal law, as that term is used in Article III. . . . **Even if only state-law claims remained after resolution of the federal question, the District Court would have discretion, consistent with Article III, to retain jurisdiction.** *See Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350-351, 108 S.Ct. 614, 98 L.Ed.2d 720 (1988) (when federal character of removed case is eliminated while the case is *sub judice*, court has discretion to retain jurisdiction, to remand, or to dismiss); *cf. Mine Workers v. Gibbs*, 383 U.S. 715, 725, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966) (pendent jurisdiction may be exercised when federal and state claims have a "common nucleus of operative fact" and would "ordinarily be expected to [be tried] all in one judicial proceeding"). *See also* 28 U.S.C. §1367 ("Supplemental jurisdiction"). . . . Thus, under the precedent that guides us, the Westfall Act's command that a district court retain jurisdiction over a case removed pursuant to §2679(d)(2) does not run afoul of Article III.

*Id.* (emphasis added).

This Court clearly justified continuing jurisdiction under Article III after the District Court's rejection of the Attorney General's Westfall Act certification because the federal question presented under the Westfall Act would not be finally resolved until the District Court had fully considered the merits of the

case. However, this Court also clearly carved out an exception in the unlikely event that state law claims remained after resolution of the Westfall Act issue. In that event, this Court held that "the District Court would have ***discretion***, consistent with Article III, to retain jurisdiction [citing *Cohill*]." *Id.* (emphasis added). That is, this Court resolved the Article III issue by holding that if only state law claims remain at some point then remand would be discretionary notwithstanding the fact that the Westfall Act provides that removal jurisdiction was to be conclusively established by the Attorney General's certification.

Since the Fifth Circuit's decision *requires* the District Court to retain jurisdiction over purely state law claims following the pre-trial dismissal of all federal claims, it exceeds the bounds of Article III as well as this Court's holdings in *Gibbs* and *Osborn*.

## III. THE FIFTH CIRCUIT'S DECISION HAS CREATED A SPLIT AMONG THE CIRCUITS

The Fifth Circuit's conclusion that the district court had continuing federal question jurisdiction and thus lacked any discretion to decide whether to hear state law claims after dismissal of the FDIC has created a conflict with decisions of the Second, Third, Eighth, Ninth and Tenth Circuits. Those courts have held that the district court has discretion whether to hear state law claims after dismissal of the FDIC, RTC or FSLIC.

The Fifth Circuit stands alone in applying a "time-of-filing rationale" as a basis for continuing federal question jurisdiction in cases where neither the FDIC nor its successor-in-interest remains as a party. Thus, the Fifth Circuit also stands alone in holding

the district court lacks discretion to remand state law claims in cases where neither the FDIC nor its successor remains as a party.

The Second Circuit has addressed the same situation as that presented here: suit was filed asserting state law claims, the FDIC became receiver of a defendant bank, the FDIC intervened and removed the case to federal court pursuant to 12 U.S.C. §1819(b)(2), and the FDIC was then dismissed. *Mizuna, Ltd. v. Crossland Federal Sav. Bank*, 90 F.3d 650, 657 (2nd Cir. 1996). The Second Circuit did not apply the Fifth Circuit's "time-of-filing rationale" in reviewing the district court order denying remand. Instead, citing both *Cohill* and 28 U.S.C. §1367, the Second Circuit held that the district court had discretion whether to remand following dismissal of the FDIC:

> Once the district court exercised original jurisdiction over Mizuna's claim against the Bank under 12 U.S.C. §1819(b)(2) and 28 U.S.C. §1331, it also had supplemental jurisdiction over Mizuna's claim against Royal because the two claims are clearly "so related" as to be part of the same controversy. *See* 28 U.S.C. §1367(a) . . . . When the Bank was dropped from the case, the district court still had the *power* under 28 U.S.C. §1367 to exercise supplemental jurisdiction over the other claims. . . . **Though the court also had the *discretion* to remand the case to state court, *see* 28 U.S.C. §1367(c)(3); *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 357, 108 S.Ct. 614, 622-23, 98 L.Ed.2d 720**

> (1988), it properly exercised its discretion to retain jurisdiction . . . .[7]

*Mizuna, Ltd. v. Crossland Federal Sav. Bank*, 90 F.3d 650, 657 (2nd Cir. 1996) (Emphasis added).

The Fifth Circuit expressed the view that the Second Circuit adopted a contrary position in a subsequent decision, *FDIC v. Four Star Holding Co.*, 178 F.3d 97, 100-01 (2nd Cir. 1999). (Pet. App. 9a-10a). However, Petitioners respectfully submit that reliance on *Four Star* is improper because, unlike this case and unlike *Mizuna*, the FDIC's successor remained as a party in *Four Star*.[8] Cases such as *Four Star* where the FDIC is replaced by a party who purchased the receivership assets and who then remains as a party present materially different policy reasons for retaining jurisdiction not involved here. For instance, if the FDIC's successor is not permitted to maintain the federal forum obtained by the FDIC, then that could impede the FDIC's ability to dispose of receivership estates.

The Eighth Circuit likewise applied an abuse of discretion standard in *Myers v. Moore Engineering, Inc.*, 42 F.3d 452, 454 (8th Cir. 1994). *Myers* was commenced as a state court action against real estate developers, bank lenders and others. The RTC intervened, substituted itself as receiver for a bank lender and removed the case to federal court pursuant to

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[7] The court explained the history of the case which justified the district court's discretionary decision not to remand. *Mizuna, Ltd. v. Crossland Federal Sav. Bank*, 90 F.3d 650, 657 (2nd Cir. 1996).

[8] It should be noted that in an even later decision the Second Circuit continues to cite *Mizuna* with approval. *See, Parker v. Della Rocco*, 252 F.3d 663, 666 (2nd Cir. 2001).

12 U.S.C. §1441(a).[9] The Eighth Circuit applied an abuse of discretion standard to determine whether the district court properly denied a motion to remand following dismissal of the RTC on the eve of trial. *Id.* In a more recent case, the Eighth Circuit has called into question, without deciding, whether the district court has discretion to remand state law claims following dismissal of the FDIC. *Casey v. F.D.I.C.*, 583 F.3d 586, 591-592 (8th Cir. 2009). This further points to the need for this Court to put the issue to rest.

The Tenth Circuit Court of Appeals similarly applied an abuse of discretion standard in determining whether the district court properly denied remand after dismissal of the FSLIC. *Bank of Oklahoma, N.A., Grove Branch v. Islands Marina, Ltd.*, 918 F.2d 1476, 1480 (10th Cir. 1990).

In an analogous case where the RTC, as receiver, filed a state law collection suit in federal court, the Third Circuit addressed whether the district court retained continuing original subject matter jurisdiction over remaining state law claims following dismissal of the RTC. *New Rock Asset Partners, L.P. v. Preferred Entity Advancements, Inc.*, 101 F.3d

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[9] 12 U.S.C.A. §1441a(*l*) contains a provision comparable to 12 U.S.C. §1819 (b)(2):

> (*l*) Power to remove; jurisdiction
>
> (1) In general
>
> Notwithstanding any other provision of law, any civil action, suit, or proceeding to which the Corporation is a party shall be deemed to arise under the laws of the United States, and the United States district courts shall have original jurisdiction over such action, suit, or proceeding.

1492, 1502-1503 (3rd Cir. 1996). The Third Circuit concluded that federal question jurisdiction ceased once the RTC was dismissed:

> Based on the language of §1441a(*l*)(1), its legislative history, and the background and purpose of FIRREA, we conclude that the plain meaning of the statute precludes continuing jurisdiction over an action where the RTC is no longer a party. Section 1441a(*l*)(1) will not support jurisdiction in this case.

*Id.* at 1501. Contrary to the Fifth Circuit, the Third Circuit provided a thorough examination of the reasons the "time-of-filing rationale" should not apply. *Id.* at 1503-1504. The Third Circuit squarely held that the district court retained only supplemental jurisdiction under 28 U.S.C. §1367 once the RTC was dismissed. *Id.* at 1511.

Similarly, the Ninth Circuit has issued an unpublished decision applying an abuse of discretion standard under 28 U.S.C. §1367 in determining whether a district court could decide state law claims after dismissal of the FDIC where federal jurisdiction had rested solely on the FDIC's presence in the suit.[10] *Diehl v. F.D.I.C.*, 1994 WL 68239, 2 (9th Cir. 1994).

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[10] A number of district courts have also found that the courts have discretion to remand after the FDIC, RTC or FSLIC is dismissed. *See, Vivo v. IndyMac Bank, FSB*, 2009 WL 1635135, 4 (C.D. Cal. 2009) (exercising discretion to remand case to state court following dismissal of FDIC); *Bauer v. Dean Morris, L.L.P.* 2009 WL 2496579, 3 (E.D. La. 2009) (same); *Katz v. Denn*, 2007 WL 4197488, 3 (D. Mass. 2007) (same); *Heaton v. Monogram Credit Card Bank of Georgia*, 408 F.Supp.2d 213, 221 (E.D. La. 2005) (same); *Turner v. Wells Fargo Bank*, 2005 WL 1865421, 3 (N.D. Cal. 2005) (same); *Robinson v. Alaska Properties and Inv., Inc.*, 878 F.Supp. 1318, 1319 (D. Alaska 1995) (same); *Espinosa*

It is worthy of note that the Fifth Circuit's decision in this case also conflicts with earlier Fifth Circuit decisions.[11]

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*v. DeVasto*, 818 F.Supp. 438, 444 (D. Mass. 1993) (same); *Hill v. Samuel Cabot, Inc.*, 1993 WL 343673, 4 (D. Mass. 1993) (same); *Gutierrez v. Champion Sav. Ass'n.*, 727 F.Supp. 1088, 1090 (S.D. Tex. 1989) (same); *Sheftz v. Benson*, 1995 WL 303967, 2 (E.D. Pa. 1995) (exercising discretion to remand case following dismissal of RTC); *Tackett v. California Independent Trust Deed*, 859 F.Supp. 1289, 1293-1294 (C.D. Cal. 1994) (same); *Sunrise Sav. and Loan Ass'n v. LIR Development Co.*, 641 F.Supp. 744, 747 (S.D. Fla. 1986) (exercising discretion to remand case to state court following dismissal of FSLIC); *see also*, *F.D.I.C. v. Mustilli*, 2010 WL 147932, 2 (D. N.J. 2010) (exercising discretion to decline to hear state law claims after dismissal of FDIC); *Harris v. Police & Fire Federal Credit Union*, 1999 WL 96006, 4 (E.D. Pa. 1999) (same); *F.D.I.C. v. Wells*, 1996 WL 332801, 2 (N.D. Ill. 1996) (same).

[11] *See*, *Wilson v. First Gibraltar Bank, F S B, Arlington, Texas*, 1994 WL 199108, 6 (5th Cir. 1994) (citing *Cohill* in holding that after dismissal of claims against the FDIC, the district court properly exercised discretion in dismissing pendent state law claims against other parties); *Bruneau v. F.D. C.*, 981 F.2d 175, 178 (5th Cir. 1992) ("dismiss[ing] out-of-hand the assertion that the district court abused its discretion in not exercising pendant jurisdiction over the state law claims" after the FDIC was dismissed from the case); and *Warfield v. Fidelity and Deposit Co.*, 904 F.2d 322, 324 (5th Cir. 1990)("dismissal of the F.D.I.C. did not destroy subject matter jurisdiction. . . . Once the grounds for federal jurisdiction disappeared, the district court had the discretion to retain the case or to remand it." [citing *Cohill*]).

## CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the Fifth Circuit Court of Appeals.

Respectfully submitted,

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March 16, 2010

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**APPENDIX A**

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed October 28, 2009]

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No. 08-60674

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GLENN ALLEN ADAIR, doing business as Super D #229; DALLAS LITTLE, doing business as Little's Pharmacy; SOUTHERN DISCOUNT DRUGS OF CHARLESTON, doing business as Southern Discount Drugs/Robert T Salmon; MAY'S PHARMACY, doing business as Coldwater Pharmacy/James A May; ANIMAL MEDICAL CENTER OF ELLISVILLE, INC; *et al.*,
*Plaintiffs-Appellees,*

vs.

LEASE PARTNERS, INC; BANCORPSOUTH BANK,
*Defendants-Appellants,*

FIRST BANK RICHMOND, S B, doing business as First Federal Leasing and Interstate Financial,
*Appellant.*

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Appeal from the United States District Court for the Southern District of Mississippi

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Before REAVLEY, JOLLY, and WIENER, *Circuit Judges.*

REAVLEY, *Circuit Judge*:

This is an appeal from the district court order remanding this case to state court. The Federal

Deposit Insurance Corporation ("FDIC")—an intervening Defendant—had removed the case to federal court but was later dismissed as a party. The district court held that once the FDIC was dismissed, only supplemental jurisdiction remained over Appellees' remaining claims. The court subsequently exercised its claimed discretion to remand the case. We reverse.

I.

This case is a collection of claims brought by many individual pharmacies, pharmacists, veterinarians and veterinary clinics ("Plaintiffs") against individual salesmen and different financial institutions ("Defendants"). Plaintiffs filed the case in 1996 in Mississippi state court, alleging state law fraud, negligence, breach of contract, and usury claims. Plaintiffs allege that Defendants participated in a Ponzi scheme in which Defendants leased Recomm electronic advertising banners to Plaintiffs, fraudulently misrepresented their identity as lessors, and charged usurious interest rates on the finance charges.

After more than eleven years of litigation, the FDIC entered the case in 2007 as a receiver for a successor bank to one of the original Defendants.[1] The FDIC timely removed the case to federal district court pursuant to 12 U.S.C. § 1819(b)(2). In 2008 Plaintiffs filed a motion to dismiss all claims against the FDIC. Plaintiffs also filed a motion to remand the case to state court. The FDIC joined in Plaintiffs' motion to dismiss but not in their motion to remand.

The district court granted both of Plaintiffs' motions. With the FDIC no longer a party, the court

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[1] By this time, the case had gone from state court to federal court and was once again in state court.

held that no original federal jurisdiction remained over Plaintiffs' remaining claims and that it retained only supplemental jurisdiction over the remaining claims. As the court saw no reason to continue exercising jurisdiction over a case composed of what it saw as predominantly state claims, the court stated that it would exercise its discretion to remand the case to state court.

Defendants appeal the district court's remand order.

II.

An order remanding a case to state court is typically not reviewable on appeal.[2] However, this court has jurisdiction over a remand order where the district court based its decision on an affirmative exercise of discretion rather than on a finding of lack of jurisdiction. *See Regan v. Starcraft Marine, LLC.*[3] A district court's remand order is final for appeal purposes. *Quackenbush v. Allstate Ins. Co.*[4]

Whether a district court has the discretion to remand a case to state court is a legal question this court reviews de novo. *See Poche v. Tex. Air Corps, Inc.*[5] If the district court has the discretion to remand a case, this court reviews its decision for abuse of discretion.[6]

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[2] *See* 28 U.S.C. § 1447(d).

[3] 524 F.3d 627, 631 (5th Cir. 2008).

[4] 517 U.S. 706, 715, 116 S. Ct. 1712, 1720 (1996).

[5] 549 F.3d 999, 1001 (5th Cir. 2008) (citing *Hook v. Morrison Milling Co.*, 38 F.3d 776, 780 (5th Cir. 1994)).

[6] *See id.* (citing *Hook*, 38 F.3d at 780).

## III.

None of the parties disputes that the district court had jurisdiction over the case at the time of remand. The issue is whether the court was obligated to retain jurisdiction and hear the case or whether it had discretion to remand. To answer this question, we must determine what kind of jurisdiction existed at the time of remand. *See Buchner v. FDIC.*[7]

When the federal court has original subject-matter jurisdiction over a claim, that jurisdiction is "not discretionary with the district court" and "can neither be conferred nor destroyed by the parties' waiver or agreement."[8] However, if a court has only supplemental jurisdiction over a claim, Congress has granted authority to adjudicate the claim or remand the claim based on the court's discretion.[9] Appellants argue that the district court had no authority to remand the case because 12 U.S.C. § 1819(b)(2) continues to provide original jurisdiction over all claims in the case, even after the FDIC's dismissal. Appellees argue that the district court had the discretion to remand the case pursuant to 28 U.S.C. § 1367(c) because the court retained only supplemental jurisdiction over the remaining claims once the FDIC was dismissed. Although the district court had very good reasons for remanding, our precedent supports the position of Appellants.

It is undisputed that the FDIC properly removed this case pursuant to 12 U.S.C. § 1819(b)(2). This statute states in relevant part:

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[7] 981 F.2d 816, 818 (5th Cir. 1993).

[8] *Id.* at 820-21.

[9] *See, e.g.*, 28 U.S.C. §§ 1367(c), 1441(c).

(A) In general

[Except in situations irrelevant to the instant case], all suits of a civil nature at common law or in equity to which the Corporation [FDIC], in any capacity, is a party shall be deemed to arise under the laws of the United States.

(B) Removal

[Except in situations irrelevant to the instant case], the Corporation may, without bond or security, remove any action, suit, or proceeding from a State court to the appropriate United States district court before the end of the 90-day period beginning on the date the action, suit, or proceeding is filed against the Corporation or the Corporation is substituted as a party.[10]

Congress enacted § 1819(b)(2) as part of the Financial Institutions Reform, Recovery, and Enforcement Act ("FIRREA").[11] FIRREA is a comprehensive regulatory scheme that Congress passed in response to the savings-and-loan crisis of the late 1980s and early 1990s. *See In re Meyerland Co.*[12] Pursuant to FIRREA, the FDIC succeeded the Federal Savings and Loan Insurance Corporation ("FSLIC") as conservator and receiver for defaulting federally-insured financial institutions.[13] FIRREA is specifically designed to "'enhance and clarify enforcement powers of the financial institution regulatory agencies,'" and

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[10] § 1819(b)(2)(A)-(B).

[11] Pub. L. No. 101-73, 103 Stat. 183 (1989).

[12] 960 F.2d 512, 514-15 (5th Cir. 1992) (en banc).

[13] *See id.*

"greatly expands the FDIC's role in regulating and supervising such institutions."[14]

Among the many powers granted to the FDIC by FIRREA, "[t]he power . . . to invoke federal jurisdiction and to remove from state court is substantial."[15] Pursuant to § 1819(b)(2)(A), all suits to which the FDIC is a party and all component claims in those suits are "*conclusively* presumed to arise under the laws of the United States, and thus . . . within the original subject matter jurisdiction of the proper federal district court."[16] Because a suit and all its component claims are conclusively deemed to arise under federal law once the FDIC is a party, § 1819(b)(2) provides jurisdiction over suits whose causes of action may otherwise largely depend on state law and which may not otherwise be subject to federal-question jurisdiction under the general federal-question statute of 28 U.S.C. § 1331.[17] Ultimately, in enacting FIRREA, "Congress used very strong language to afford the FDIC every possibility

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[14] *Id.* (quoting and citing H.R. REP. NO. 101-54(I) 291, 310-11, *reprinted in* 1989 U.S.C.C.A.N. 86, 106-07).

[15] *Id.* at 515 (citing *Carrolltown-Farmers Branch Indep. Sch. Dist. v. Johnson & Cravens, 13911, Inc.*, 889 F.2d 571, 572 (5th Cir. 1989); *Triland Holdings & Co. v. Sunbelt Serv. Corp.*, 884 F.2d 205, 207 (5th Cir. 1989)).

[16] *Buchner*, 981 F.2d at 819 (emphasis added); *see also FSLIC v. Mackie*, 962 F.2d 1144, 1150 (5th Cir. 1992) (recognizing removal jurisdiction over pendent party claims pursuant to 12 U.S.C. § 1730(k)(1) (repealed 1989), § 1819(b)(2)'s predecessor).

[17] *See Meyerland*, 960 F.2d at 518-19 (comparing the grant of jurisdiction under § 1819(b)(2) to that recognized in *Pacific Railroad Removal Cases*, 115 U.S. 1, 5 S. Ct. 113 (1885), and *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 822 (1824)).

of having a federal forum within the limits of Article III."[18]

The language of § 1819(b)(2)(A) states that all claims in a suit "arise under the laws of the United States" when the FDIC "is a party." Nothing in the statute specifically addresses what happens to a court's jurisdiction, if anything, when the FDIC is dismissed as a party. Consequently, the circuits are split on whether § 1819(b)(2) continues to provide original federal subject matter jurisdiction over a case after the FDIC is dismissed. Only three circuits have specifically addressed this issue. In the majority are the Fifth Circuit and the Second Circuit, which hold that § 1819(b)(2) continues to provide federal jurisdiction after the FDIC has been dismissed from a case or has transferred its assets to a third party. *See FSLIC v. Griffin*;[19] *FDIC v. Four Star Holding Co.*[20] In the minority is the Third Circuit, which holds that original federal jurisdiction ceases with the dismissal of a FIRREA federal corporation and only supplemental jurisdiction remains.[21] *New Rock Asset Partners*,

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[18] *Id.* at 519 (citation and footnote omitted).

[19] 935 F.2d 691, 697 (5th Cir. 1991).

[20] 178 F.3d 97, 100-01 (2d Cir. 1999).

[21] While not expressly addressing the issue of continuing original jurisdiction, the Eighth Circuit has reviewed a district court's remand for abuse of discretion in a case where the Resolution Trust Corporation ("RTC") removed the case under an analogous statute but was later dismissed, thus implicitly adopting *New Rock's* holding, if not its reasoning. *See Myers v. Moore Eng'g Inc.*, 42 F.3d 452, 455 (8th Cir. 1994) (holding the district court did not abuse its discretion in denying remand when the RTC had previously removed pursuant to 12 U.S.C. § 1441a(*l*)(1)).

*L.P. v. Preferred Entity Advancements, Inc.*[22]

In *Griffin*, the FSLIC entered a state court action as receiver for the plaintiff and subsequently removed the case to federal court pursuant to 12 U.S.C. § 1730(k)(1), a statute which was later repealed and retroactively superseded by 12 U.S.C. § 1819.[23] During the pendency of the case, Congress passed FIRREA, and the FDIC succeeded the FSLIC as receiver.[24] The district court then granted Griffin's motion to dismiss its counterclaims against the FDIC, but the court retained jurisdiction over the case between Griffin and the FDIC's successor in interest, who had intervened against Griffin.[25] The district court ultimately held against Griffin.[26] Griffin appealed to this court, arguing that the federal court lacked jurisdiction once the FDIC was dismissed.[27]

We disagreed, holding that federal jurisdiction continued to exist pursuant to § 1819 after the FDIC's dismissal.[28] The court provided two rationales for its decision. The court first stated that "[t]he power to remove is evaluated at the time of removal."[29] Although § 1730(k)(1) controlled when the FSLIC removed, FIRREA was enacted to "correct any possible jurisdictional defects existing at the time of

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[22] 101 F.3d 1492, 1494-95 (3d Cir. 1996).

[23] *See Griffin*, 935 F.2d at 694-95.

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.* at 695.

[28] *Id.* at 696.

[29] *Id.*

removal."[30] Accordingly, the enacting of § 1819(b)(2) after removal and the FDIC's later dismissal from the case "cannot defeat this intent."[31] The court then cited federal policy interests which favored recognizing jurisdiction over the FDIC's successor in interest.[32] Specifically, the court recognized the need to provide federal protection to successors in interest to the FDIC under the *D'Oench Duhme* doctrine, which is designed to "protect[ ] the FDIC and its assignees from unrecorded side agreements not reflected in the bank's records[.]"[33] The court concluded its discussion of the issue by stating, "federal jurisdiction is proper in this case because according to . . . § 1819, the case arises under federal law. Since federal jurisdiction exists, federal law applies."[34]

The Second Circuit followed *Griffin* in *Four Star Holding*.[35] In *Four Star Holding*, the FDIC brought a foreclosure action in federal court pursuant to § 1819(b)(2)(A) but then transferred all its interests to a third party.[36] On appeal, the defendants argued that with the transfer of the FDIC's interest in the case to another party, no federal jurisdiction remained.[37] However, the Second Circuit held that jurisdiction continued pursuant to § 1819, and it cited

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[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *Id.* at 697 (citing *D'Oench Duhme & Co. v. FDIC*, 315 U.S. 447, 62 S. Ct. 676 (1942)). Congress partially codified *D'Oench Duhme* in 12 U.S.C. § 1823(e).

[34] *Id.* at 696.

[35] *See* 178 F.3d at 101.

[36] *Id.* at 99.

[37] *Id.* at 100.

both the time-of-filing doctrine and the federal policy rationales set forth in *Griffin* as justifications for retaining jurisdiction.[38] Synthesizing the time-of-filing rationale with additional federal policy concerns, the Second Circuit stated:

> "Adopting a rule which would make federal jurisdiction contingent on who owned an interest in certain property at a particular time 'could well have the effect of deterring normal business transactions during the pendency of what might be lengthy litigation,'" *CIT, Inc. v. 170 Willow Street Assoc.*, No. 93 Civ. 1201 CSH, 1997 WL 528163, at *7 (S.D.N.Y. Aug. 26, 1997) (quoting *Freeport-McMoRan, Inc.*, 498 U.S. at 428), and could also deter transactions by FDIC that presumably are in the public interest.[39]

Meanwhile, the Third Circuit expressly rejected the *Griffin* court's holding that original federal jurisdiction continues pursuant to § 1819(b)(2) after the FDIC is dismissed from a case.[40] In *New Rock*, the

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[38] *See id.* (citing *Griffin*, 935 F.2d at 969; *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 830, 109 S. Ct. 2218 (1989); *Freeport-McMoRan, Inc. v. K N Energy, Inc.*, 498 U.S. 426, 428, 111 S. Ct. 858 (1991) (per curiam)).

[39] *Id.* at 100-01. Although the Second Circuit follows *Griffin* in *Four Star Holding*, other Second Circuit cases have not recognized original jurisdiction over pendent state claims. *See, e.g., King v. Crossland Sav. Bank*, 111 F.3d 251, 255-56 (2d Cir. 1997) (finding exercise of supplemental jurisdiction appropriate over pendent party claims pursuant to § 1367 in case removed pursuant to § 1819(b)(2)); *Mizuna, Ltd. v. Crossland Fed. Sav. Bank*, 90 F.3d 650, 657 (2d Cir. 1996) (same). However, because original jurisdiction pursuant to § 1819 applies to all cases in a "suit," these latter cases inconsistently apply § 1819(b)(2).

[40] *See New Rock Asset Partners, L.P.*, 101 F.3d at 1502.

Resolution Trust Corporation ("RTC"), which Congress created under FIRREA, filed a case in federal court pursuant to 12 U.S.C. § 1441a(*l*)(1).[41] The RTC then sold its interests to a private third party and was dismissed from the case.[42] Analogizing § 1441a(*l*)(1) to § 1819(b)(2), and citing to *Griffin*'s analysis, the Third Circuit held that § 1441a(*l*)(1) "precludes continuing jurisdiction over an action where the RTC is no longer a party" because "the policy reasons for federal jurisdiction [under FIRREA] end when the FDIC or RTC leaves the case."[43] The court further held that the time-of-filing doctrine was insufficient to retain jurisdiction under FIRREA because the doctrine was more closely associated with diversity cases than federal-question cases.[44] Moreover, the court noted that other courts had inconsistently applied the time-of-filing doctrine in federal-question cases.[45] Ultimately, however, the *New Rock* court concluded that while original jurisdiction was lacking, a district court could retain supplemental jurisdiction over state claims pursuant to 28 U.S.C. § 1367(c).[46]

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[41] *Id.* at 1495. Section 1441a(*l*)(1) states:

> Notwithstanding any other provision of law, any civil action, suit, or proceeding to which the Corporation is a party shall be deemed to arise under the laws of the United States, and the United States district courts shall have original jurisdiction over such action, suit, or proceeding.

[42] *Id.*

[43] *Id.* at 1501-02 (citing *Mill Invs., Inc. v. Brooks Woolen Co.*, 797 F. Supp. 49 (D. Me. 1992)).

[44] *Id.* at 1503-04.

[45] *Id.*

[46] *Id.* at 1504.

All three of these cases make it clear that a court following *Griffin* will recognize continued federal jurisdiction when the FDIC removes a case but is later dismissed, and that this jurisdiction *is pursuant to 12 U.S.C. § 1819* and not any other statute.[47] As *Griffin* is Fifth Circuit precedent, we are bound by its holding.

Because federal jurisdiction continues in this case pursuant to § 1819(b)(2), that jurisdiction extends to all claims in the "suit," regardless of their state or federal origin.[48] As the district court retained original jurisdiction over all claims in this case, remand for

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[47] *See Griffin*, 935 F.2d at 696 ("In sum, federal jurisdiction is proper in this case because *according to . . . § 1819*, the case arises under federal law.") (emphasis added); *Four Star Holding*, 178 F.3d at 101 (following *Griffin* to hold that FDIC's dismissal "does not divest the court of subject matter jurisdiction *under Section 1819*") (emphasis added); *New Rock Asset Partners, L.P.*, 101 F.3d at 1502, 1504 (disagreeing with *Griffin* and holding that supplemental jurisdiction, not original jurisdiction, existed after RTC's dismissal).

[48] *See* § 1819(b)(2)(A) ("suit" shall "arise under the laws of the United States"); *Meyerland*, 960 F.2d at 518-19; *Buchner*, 981 F.2d at 819; *see also Mackie*, 962 F.2d at 1150 (holding that the term "suit" in § 1730(k)(1) covers the "entirety of the civil proceeding"); *Brockman v. Merabank*, 40 F.3d 1013, 1015-16 (9th Cir. 1994) (holding that the term "suit" in § 1441a(*l*)(1) includes all claims in a case, and that the addition of RTC to the action "transformed the 'entire suit' into one that arose under federal law.") (citation omitted); *Spring Garden Assoc. v. RTC*, 26 F.3d 412, 415-16 (3d Cir. 1994) (same). Indeed, as even courts that disagree with the Fifth Circuit recognize, the disputed issue in the circuits regarding § 1819(b)(2) is ultimately one of jurisdictional "duration" rather than of jurisdictional "breadth." *See New Rock Asset Partners, L.P.*, 101 F.3d at 1499 n.4 (distinguishing the question before it from the holding in *Spring Garden*).

any claim was inappropriate.[49]

We recognize that the party in *Griffin* arguing for federal jurisdiction was a successor in interest to the FDIC, and no successor in interest remains in the instant case.[50] In addition, the *Griffin* court expressly cited the existence of a successor in interest as part of its rationale for continued jurisdiction.[51] However, the *Griffin* court clearly relied on the time-of-filing rationale for recognizing federal jurisdiction under its interpretation of § 1819(b)(2), with the federal policy concerns it cited as "[f]urther" justifications.[52] Moreover, Fifth Circuit cases following *Griffin* exclusively cite the time-of-filing rationale as their reason for recognizing original jurisdiction, and they make no mention of the policy concerns the *Griffin* court also relied on.[53] In at least one case, a prior Fifth Circuit panel has recognized original jurisdiction based on § 1819(b)(2) when no successor in interest to the FDIC remained.[54] Accordingly, a successor in interest to the FDIC is not necessary for original jurisdiction to continue pursuant to § 1819(b)(2).

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[49] *See Buchner*, 981 F.2d at 821.

[50] *See Griffin*, 935 F.2d at 696.

[51] *See id.; see also Four Star Holding*, 178 F.3d at 100.

[52] *See Griffin*, 935 F.2d at 696.

[53] *See, e.g., Bank One Tex. Nat'l, Ass'n, v. Morrison*, 26 F.3d 544, 547 (5th Cir. 1994) (citing the time-of-filing rationale in Griffin as the sole basis for continued jurisdiction despite *D'Oench Duhme* being at issue in guarantor's defense); *Walker v. FDIC*, 970 F.2d 114, 120 (5th Cir. 1992); *First Gibraltar Bank, FSB v. Bradley*, 98 F.3d 1338, No. 95-20500, 1996 WL 556852, at *5 (5th Cir. Sep. 10, 1996) (unpub.) (citing *Morrison*, 26 F.3d at 547-48).

[54] *See Walker*, 970 F.2d at 120.

## IV.

We follow the rule that "a district court exceeds its authority if it remands a case on grounds not expressly permitted by controlling statute."[55] Despite the FDIC's dismissal, all claims in the instant case continue to "arise under the laws of the United States," pursuant to § 1819(b)(2). Therefore, original jurisdiction remains, and the exercise of that jurisdiction was mandatory for the district court.[56] Accordingly, the district court had no discretion to remand the case and erred in doing so.[57]

The Judgment of Remand is Reversed. The cause is reinstated in the federal court.

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[55] *Buchner*, 981 F.2d at 820 (citing *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 345, 96 S. Ct. 584, 590 (1976), *abrogated on other grounds by Quackenbush*, 517 U.S. at 714-15, 116 S. Ct. at 1720).

[56] *See Buchner*, 981 F.2d at 821.

[57] Because we find original federal jurisdiction over all claims in the instant case pursuant to § 1819(b)(2), we do not address whether Appellees' federally preempted usury claims also provide continuing federal jurisdiction, or whether the state fraud and negligence claims are "separate and independent" so as to otherwise be subject to remand under 28 U.S.C. § 1441(c).

E. GRADY JOLLY, *Circuit Judge*, concurring in the judgment:

I fully appreciate the efficient and judicially economical approach of the majority. I am unable, however, to agree that our precedent or the text of § 1819 requires that state claims cannot be remanded when no party to the case is a successor-in-interest to the FDIC and no federal interests remain in the case. Although the court clearly has jurisdiction over the case, including all state claims, that fact does not in itself mean that the court lacks discretion to remand state claims. Whether to remand is a discretionary matter subject to the abuse of discretion standard. *Regan v. Starcraft*, 524 F.3d 627, 631 (5th Cir. 2008). Once the FDIC and its interests have been dismissed, there is no federal character in the state claims. *See FSLIC v. Griffin*, 935 F.2d 691, 696 (5th Cir. 1991) (justifying continued federal-question jurisdiction based on presence of successor-in-interest to FSLIC). The statute gives original jurisdiction to cases in which the FDIC "is a party." 12 U.S.C. § 1819(b)(2)(A). The statute does not, through some feat of alchemy, make the case's state-law claims federal-law claims. Nor does the text "is a party" mean that all state-law claims in any case to which the FDIC ever was a party continue to arise under federal law after dismissal of all federal interests.

Here, I concur in the result reached by the majority because there remain federal usury claims and related state-law claims, which cannot be remanded. *Laurents v. Arcadian Corp.*, No. 94-41183, 1995 WL 625394, at *2, 69 F.3d 535 (5th Cir. Oct. 4, 1995) (setting forth rule that properly removed questions of federal law cannot be remanded under 28 U.S.C. § 1441(c)).

**APPENDIX B**

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed December 18, 2009]

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No. 08-60674

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GLENN ALLEN ADAIR, doing business as Super D #229; DALLAS LITTLE, doing business as Little's Pharmacy; SOUTHERN DISCOUNT DRUGS OF CHARLESTON, doing business as Southern Discount Drugs/Robert T Salmon; MAY'S PHARMACY, doing business as Coldwater Pharmacy/James A May; ANIMAL MEDICAL CENTER OF ELLISVILLE, INC; *et al.*,
*Plaintiffs-Appellees,*

vs.

LEASE PARTNERS, INC; BANCORPSOUTH BANK,
*Defendants-Appellants,*

FIRST BANK RICHMOND, S B, doing business as First Federal Leasing and Interstate Financial,
*Appellant.*

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Appeals from the United States District Court for the Southern District of Mississippi, Jackson

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ON PETITION FOR REHEARING AND REHEARING EN BANC

(Opinion 10/28/09, 5 Cir., _____, _____ F.3d _____)

Before REAVLEY, JOLLY and WIENER, *Circuit Judges.*

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. and 5th Cir. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor, (FED. R. APP. P. and 5th Cir. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service and not disqualified not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Thomas M. Reavley
United States Circuit Judge

* Judges Davis, Barksdale and Clement did not participate in the consideration of the rehearing en banc.

## APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

[Filed June 6, 2008]

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Civil Action No. 3:07CV608TSL-JCS

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GLENN ALLEN ADAIR d/b/a SUPER D 229; *et al.*,
*Plaintiffs,*

vs.

AMERUS LEASING, INC., *et al.*,
*Defendants,*

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## MEMORANDUM OPINION AND ORDER

On October 12, 2007, after the Federal Deposit Insurance Corporation (FDIC) was appointed Receiver for defendant NetBank, which was the successor to one of the original defendants, Republic Leasing Company, Inc., the FDIC removed the case to this court pursuant to 12 U.S.C. § 1819(b)(2)[1] and 28

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[1] That statute provides in relevant part as follows:

(2) Federal court jurisdiction

(A) In general

Except as provided in subparagraph (D), all suits of a civil nature at common law or in equity to which the Corporation, in any capacity, is a party shall be deemed to arise under the laws of the United States.

(B) Removal

Except as provided in subparagraph (D), the Corporation may, without bond or security, remove any action, suit, or

U.S.C. § 1331. Thereafter, plaintiffs moved to dismiss the FDIC and moved separately to remand the case to the Circuit Court of Hinds County, from which it was removed.[2] Plaintiffs' motion to dismiss, in which they acknowledge that they have no real possibility of collecting any judgment they might obtain against the FDIC, is joined by the FDIC. Defendants have responded to the motion, taking the position that they do not oppose dismissal of the FDIC, but that if the FDIC is dismissed, then those plaintiffs who are asserting claims against the FDIC should be dismissed from the case as well. For their part, while plaintiffs argue that defendants other than the FDIC have no standing to object to their motion, they nevertheless have agreed to the dismissal of those plaintiffs who have claims only against the FDIC. Accordingly, the motion to dismiss the FDIC will be granted, and the claims of plaintiffs Joe Ray Bourn d/b/a The Drug Store, Stan Berry, Delta Pharmacy, Inc. d/b/a Lee Pharmacy, Gerald Pugh, Rawls Drug Co., Inc., Vickie S. Ellington d/b/a Attala Discount Drugs, J. Edwin White, Service Rexall Drugs, Inc., Daryl G. Pitts and Waynesboro Animal Clinic, Inc., against the FDIC will be dismissed.

The parties all recognize that the dismissal of the FDIC does not deprive the court of jurisdiction. *See*

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> proceeding from a State court to the appropriate United States district court before the end of the 90-day period beginning on the date the action, suit, or proceeding is filed against the Corporation or the Corporation is substituted as a party.

12 U.S.C. § 1819(b)(2)(A) and (B).

[2] The court notes this is the second time this case has been removed. It was first removed in March 1996 and remanded in February 2003. *See infra* note 4.

*Bank One Texas Nat'l Assoc. v. Morrison*, 26 F.3d 544, 547 (5th Cir. 1994) ("Because jurisdiction is determined as of the time of removal and post-removal events will generally not deprive the court of jurisdiction, the FDIC's subsequent dismissal from the case did not deprive the court of subject matter jurisdiction."); *Walker v. FDIC*, 970 F.2d 114, 120 (5th Cir. 1992) (noting that "federal jurisdiction persists even though the FDIC is subsequently dismissed" from an action). However, plaintiffs take the position in their motion to remand that once the FDIC is dismissed, this court should decline to exercise jurisdiction and should remand the case to state court. On the other hand, defendants have filed separate responses in opposition to the motion to remand, variously arguing that (1) the fact that the court had jurisdiction at the time of removal due to the inclusion of the FDIC "alone demonstrates that the Court deny plaintiffs' Motion to Remand"; (2) the court has jurisdiction not only because of the FDIC's inclusion in the suit but also due to the federal preemption of plaintiffs' claim for usury; (3) the court also has jurisdiction based on diversity of citizenship; and (4) there is diversity jurisdiction based on plaintiffs' fraudulent misjoinder of claims and parties.[3]

There is no merit to defendants' suggestion that the court *must* deny plaintiffs' motion to remand

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[3] In its response, defendant BancCorpSouth Bank urges only complete preemption of the usury claim as a basis for this court's retaining jurisdiction. Defendants Whiteville Bank, First Commercial Bank of Memphis and St. James Bank and Trust filed their brief, urging each of the referenced bases for continued federal jurisdiction; defendant Lease Partners, Inc. joined in their response.

solely because there was federal jurisdiction at the time of removal. Unquestionably there was jurisdiction at the time of removal based on the FDIC's presence in the suit; and that jurisdiction continues despite dismissal of the FDIC. However, the fact that the court *may* continue to exercise jurisdiction does not mean that it *should* do so.

In support of their argument that the court should retain jurisdiction notwithstanding dismissal of the FDIC, defendants argue that there are bases for this court's jurisdiction over this case apart from the FDIC's inclusion in the suit, namely, the complete federal preemption of plaintiffs' claims for usury and diversity of citizenship. As to the former, plaintiffs do not deny that they have asserted a claim for usury, nor do they dispute that such claim is completely preempted by the National Banking Act, 12 U.S.C. § 85 and 86. *See Beneficial National Bank v. Anderson*, 539 U.S. 1, 11, 123 S. Ct. 2058, 156 L. Ed. 2d 1 (2003) (concluding that §§ 85 and 86 of the National Banking Act completely preempt state law claims of usury against national banks). Moreover, it appears from the FDIC's notice of removal that the FDIC purported to include preemption of plaintiffs' usury claim as an additional basis for its removal. Notwithstanding this, plaintiffs maintain that the case was not removable on the basis of preemption of their usury claim inasmuch as all defendants, including Republic Leasing Company, for whose successor the FDIC is now the receiver, had long ago waived the right to assert removal jurisdiction on this ground by failing to timely remove on this basis. Plaintiffs submit that having been previously waived, this could not validly be asserted as a basis for removal by the FDIC, and that therefore, this court may not, or certainly should not, assert jurisdiction

over the case on a basis that was not properly asserted in the removal notice.

Plaintiffs usury claim was set forth in their original complaint, filed in February 1996. It may be debatable whether the case was removable on the basis of complete preemption at that time; but certainly, if not then removable, the case became removable on the basis of complete preemption of the usury charge not later than the date of the Supreme Court's decision in *Anderson*, and thus, at the latest, the defendants in the case at the time (including Republic Leasing) had thirty days following the Supreme Court's decision in *Anderson* to remove the case on the basis of the usury charge.[4] *See Landry v. Cross Country Bank*, 431 F. Supp. 2d 682, 686 (S.D. Tex. 2003) (finding that complaint charging usury became removable under federal question jurisdiction

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[4] The case was removed in March 1996 on the basis of the bankruptcy of Recomm Operations, Inc., whose actions were at the center of the parties' controversy. Following removal, the plaintiffs moved to remand on the basis of discretionary abstention/equitable remand, but before a ruling was made, the case was transferred to the United States District Court for the Middle District of Florida as part of a multidistrict litigation case styled *In Re Recomm International Display, Inc., Contract Litigation*, MDL #1118. After six years, the case was remanded from the MDL to this court, at which time the parties commenced additional briefing concerning whether there remained any basis for the court's retaining jurisdiction since the case was no longer "related to" Recomm's bankruptcy (if it ever was), which had been dismissed. Finally, in February 2003, this court entered its memorandum opinion and order declining to exercise supplemental jurisdiction and remanding the case. *See Adair v. Amerus Leasing, Inc.*, Civil Action No. 3:96CV218LN (S.D. Miss. 2003). The court's decision was appealed to, and affirmed by the Fifth Circuit. *See Adair v. Amerus Leasing, Inc.*, 86 Fed. Appx. 736, 2004 WL 239684 (5th Cir. 2004).

on the date of the *Anderson* decision, so that pursuant to 28 U.S.C. 1446(b), the defendant had thirty days from June 2, 2003 to remove this case).[5] They failed to do this and thereby waived their right to remove on this ground.

More than four years later, after having been substituted as the real party in interest for NetBank, the FDIC purported to remove this case on the basis of 12 U.S.C. § 1819(b)(2)(A), under which practically any case in which the FDIC is a party is "deemed to arise under the laws of the United States." *See also Pollock v. FDIC*, 17 F.3d 798, 801 (5th Cir. 1994) ("[E]xcept in very limited circumstances, all civil cases to which the FDIC is a party are deemed to arise under federal law."). However, the FDIC also recited in its notice of removal that "Sections 85 and 86 . . . preempt state usury laws."

While the general removal statutes have been held applicable to the FDIC, *see FDIC v. Loyd*, 955 F.2d

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[5] Some courts would hold that defendants had thirty days from the date the complaint was filed to remove, notwithstanding that the decision in *Anderson* was not rendered until seven years later. *See Raeford v. Equicredit Corp. of NC*, 310 F. Supp. 2d 750 (M.D.N.C. 2004) (observing that although the *Beneficial Nat'l Bank v. Anderson* decision filed during pendency of lawsuit provided "unquestionable authority" for removal based on complete preemption of usury claims, "there [was] no reason why Defendants could not have made a similar argument for complete preemption prior to the Supreme Court's decision," and granting motion to remand "[b]ecause the Defendants did not file notice of removal within thirty days after receipt of the Complaint (asserting the usury claim)"). Here, none of those individuals or entities who were defendants in the case at the time the complaint was filed or at the time of the *Anderson* decision, including Republic Leasing, filed a timely notice of removal on the basis of the usury charge.

316 (5th Cir. 1992), § 1819(b)(2), which applies only to the FDIC, grants the FDIC "several procedural advantages . . . that go beyond the general removal authorization found in (the general removal statutes) 28 U.S.C. §§ 1441-1452." *Bullion Services, Inc. v. Valley State Bank*, 50 F.3d 705, 707 (9th Cir. 1995). For example, the statute gives the FDIC ninety days to remove, whereas the general removal statute establishes a thirty-day removal time period, *compare* § 1819(b)(2) with 28 U.S.C. § 1446; whereas the general removal statute provides only for removal by defendants, under § 1819, the FDIC may remove an action even as a plaintiff, *see Doe v. Kerwood*, *Doe v. Kerwood*, 969 F.2d 165, 168 (5th Cir. 1992) ("the FDIC may remove cases as a plaintiff"); and under the authority of § 1819, the FDIC may remove a case even after a state court has entered judgment, a right not accorded defendants by the general removal statute, *see NCNB Texas Nat. Bank v. Johnson*, 11 F.3d 1260, 1263 (5th Cir. 1994). Thus, it has been held that the FDIC is subject to the general removal statutes where there is no conflict with the FDIC's broad removal rights under § 1819(b)(2). *See Matter of Meyerland Co.*, 960 F.2d 512, 521 (5th Cir. 1992) ("To the extent that the specific powers or mechanisms in the statute are inconsistent with the general removal statutes, [§ 1819(b)(2)] supersedes the general statutes."); *Loyd*, 955 F.2d at 327 n.12 (recognizing that whereas "the general removal statute applies to the FDIC," the FDIC "is truly an exceptional entity in the application of the (removal) statutes," and observing that this can "render[ ] it very difficult faithfully, yet practicably, to apply § 1446 to" cases involving removal by the FDIC); *Buczkowski v. F.D.I.C.*, 415 F.3d 594, 596 (7th Cir. 2005) (observing

that, "given § 1819(b)(2)(B) the FDIC need not play by the normal (removal) rules").

In the court's opinion, to the extent the FDIC may have purported to remove this case based on complete preemption of plaintiffs' usury claim, the removal could not have been premised on § 1819(b)(2), but must instead have been based on the general removal statute because § 1819(b)(2) does not purport to authorize the FDIC to remove on any basis other than its becoming a party to the litigation. Thus, with respect to this additional basis for removal, i.e., complete preemption of the usury claim, the FDIC is subject to the same rules as any other party and enjoys no enhanced removal rights.

Under the general removal statute, when a complaint is amended to add a new defendant, the rule of unanimity (which rule requires the timely joinder or consent of all properly served defendants to removal) will operate to preclude the new defendant from removing. *See Brown v. Demco, Inc.*, 792 F.2d 478, 482 (5th Cir. 1986) (recognizing that if the first-served defendant does not timely remove, a subsequently added or served defendant cannot remove because that defendant cannot fulfill the unanimity requirement). Under 18 U.S.C. § 1819(b)(2), the rule of unanimity does not apply to an FDIC removal. *See In re Franklin Nat. Bank Sec. Litig. v. Andersen*, 532 F.2d 842, 846 (2d Cir. 1976) (holding that the "all defendants must consent" requirement of 28 U.S.C. § 1441 does not apply to the FDIC's removal under 12 U.S.C. § 1819) (cited in *Doe v. Kerwood*, 969 F.2d 165, 168 (5th Cir. 1992)); *Doe*, 969 F.2d at 168 (stating that "the FDIC, the FSLIC, and federal officers each have their own specific removal statute," and "[t]he fact that these parties may remove without the con-

sent of co-defendants is based on the language of those statutes"). On the other hand, the rule of unanimity does apply to a federal question removal under the general removal statute. *See Washington v. Derknoco Auto Sales*, Civil Action No. 3:06cv293LR, 2006 WL 1892549 (S.D. Miss. July 10, 2006). Thus, given that the FDIC's removal on the basis of complete preemption of the usury claim is grounded on the general removal statute, then, if this case were viewed as involving the addition of the FDIC as a new defendant, the FDIC would be precluded by the rule of unanimity from removing on the basis of complete federal preemption.

In fact, however, this is not a case of an amendment adding a new party defendant, but rather a case of one party being substituted for another. The FDIC was substituted for NetBank, whose predecessor, Republic Leasing Company, had waived its right to remove on the basis of complete preemption years before the FDIC became involved. The court obviously recognizes that the FDIC had a virtually unqualified right to remove under § 1819(b)(2) once it became a party; and nothing that had occurred prior to its becoming a party could have affected that right. However, to the extent it purported to remove on any other basis, the FDIC, as a substituted party, "[came] into the suit subject to all the disabilities of the original defendant (Republic Leasing) so far as the right of removal is concerned." *Neely v. Planters' Nat. Bank of Clarksdale, Miss.*, 48 F.2d 266, 267 (N.D. Miss. 1931) (citing *Cable v. Ellis*, 110 U.S. 389, 4 S. Ct. 85, 28 L. Ed. 186 (1884)). *See also Oster v. Rubinstein*, 136 F. Supp. 733, 734 (S.D.N.Y. 1955) (stating that "a party who comes into a case as a substitute for an original party cannot exercise the right of removal . . . if the original party could not

have removed the case").[6] Thus, since Republic Leasing/NetBank was barred from removing on the basis of complete preemption of the usury claim, then so was the FDIC, and this court therefore does not have removal jurisdiction due to federal preemption of plaintiffs' claim for usury.[7]

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[6] The court notes that in the context of diversity jurisdiction, whereas the *addition* of a non-diverse party following removal will deprive the court of diversity jurisdiction, *see* 28 U.S.C. § 1447(e), a transfer-of-interest-type *substitution* of one party for another under Rule 25(c) generally will not. *See Freeport-McMoRan Inc. v. K N Energy, Inc.*, 498 U.S. 426, 111 S. Ct. 858, 112 L. Ed. 2d 951 (1991) (per curiam) (holding that substitution of non-diverse party pursuant to Rule 25(c) generally does not deprive the district court of subject matter jurisdiction, and thus does not require remand or dismissal); *Cobb v. Delta Exports, Inc.*, 186 F.3d 675, 681 (5th Cir. 1999) (contrasting effect of addition of party with Rule 25(c) substitution of party on diversity jurisdiction).

[7] Generally, "when the FDIC operate[s] as receiver, it step[s] 'into the shoes' of the bank." *F.D.I.C. v. Wheat*, 970 F.2d 124, 130 (5th Cir. 1992). *See also O'Melveny & Myers v. FDIC*, 512 U.S. 79, 86, 114 S. Ct. 2048, 129 L. Ed. 2d 67 (1994) (finding that "Section 1821(d)(2)(A)(I), which is part of a title captioned 'Powers and duties of [the FDIC] as ... receiver,' states that 'the [FDIC] shall, ... by operation of law, succeed to-all rights, titles, powers, and privileges of the insured depository institution ....' 12 U.S.C. § 1821(d)(2)(A)(I) (1988 ed., Supp. IV). This language appears to indicate that the FDIC as receiver 'steps into the shoes' of the failed S&L"); *F.D.I.C. v. Fidelity & Deposit Co. of Md.*, 45 F.3d 969, 972 (5th Cir. 1995) (observing that after taking receivership of a failed bank, the FDIC "stepped into [the bank's] shoes for purposes of [pending] lawsuit"). While that may not be strictly true in all respects, *see, e.g., F.D.I.C. v. Fidelity & Deposit Co. of Md.*, 973 F.2d 1236, 1245 n.19 (5th Cir. 1995) (noting FDIC's argument that it does not simply "stand in the shoes" of a failed bank in asserting claims against the bank's officers and directors), the court knows of no reason why it

Several of the defendants argue next that the court should deny plaintiffs' motion to remand because there is complete diversity among the parties, as all plaintiffs are Mississippi citizens and as the moving defendants are non-Mississippi citizens. In the court's opinion, it matters not whether the requirements of diversity jurisdiction are met, as all defendants have waived any right they could possibly have had to assert diversity jurisdiction as a ground for removal. There a one-year time limit on diversity removals, *see* 28 U.S.C. § 1446(b), which defendants cannot satisfy, given that the complaint was filed nearly twelve years ago. Moreover, the FDIC did not purport to remove the case on the basis of diversity jurisdiction and no other defendant purported to remove the case on the basis of diversity jurisdiction.[8] Rather, defendants merely asserted diversity of citizenship as a basis for jurisdiction in their response to plaintiffs' motion to remand.

Moreover, the defendants who seek remand on this basis do not contend there is complete diversity among all the parties, i.e., between *all* plaintiffs and *all* defendants. Rather, they argue that they should be considered a separate group from the other defendants, and that all members of their smaller group are of diverse citizenship from the plaintiffs asserting claims against them. *See* Response of Whiteville Bank, First Commercial Bank of Memphis and St. James Bank and Trust, p.4 ("[T]his court should retain jurisdiction of the action because all claims against *these Defendants* involve complete diver-

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would not be true with respect to the right to remove this case on any basis other than § 1819(b)(2).

[8] In fact, no other defendant has even joined in the FDIC's notice of removal.

sity."). Even if there were diversity between the plaintiffs and some group of the defendants—which is doubtful and plainly has not been demonstrated by "these defendants"[9]—the determination on removal of whether there is complete diversity takes into account the citizenship of all the parties, not just some select group of parties *unless* there has been fraudulent misjoinder. And while these defendants do argue that there has been fraudulent misjoinder, this court previously rejected their fraudulent misjoinder argument when it remanded this case the first time. The court noted as follows:

> Some of the defendants claim that this case should not be remanded because diversity jurisdiction exists. They reason that the claims of some plaintiffs as to whose claims there would be diversity jurisdiction have been fraudulently misjoined with the claims of other plaintiffs, as to whose claims there is no basis for diversity jurisdiction. Given that no party suggested diversity jurisdiction as a basis for removal in the notice of removal or in any paper filed within the time for removal allowed under 28 U.S.C. § 1446(c), it may not now be urged as a basis for this court's exercise of jurisdiction. *See Blakely v. United Cable System*, 105 F. Supp. 2d 574, 579 (S.D. Miss. 2000). But even if this had been, or

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[9] These defendants assert only that they believe the salesmen plaintiffs have sued in connection with their lease agreements with these defendants are citizens of Louisiana, and not citizens of Mississippi, but acknowledging uncertainty, challenge plaintiffs to produce documentation disclosing the identity and citizenship of these salesmen. In response, plaintiffs have produced documents showing that a Mississippi citizen, Buel Humphreys, was the salesman on several of the transactions at issue.

> could now be timely raised, and even though this court recognizes the concept of fraudulent misjoinder, defendants have not shown that there has been fraudulent misjoinder on the facts alleged by plaintiffs.

*See Adair v. Amerus Leasing, Inc.*, Civil Action No. 3:96CV218LN, at 22 n.12 (S.D. Miss. 2003). The court will not revisit this issue .[10]

Defendants have offered no reason for this court's continued exercise of jurisdiction other than their urging the court to exercise jurisdiction on bases which they waived by failing to timely assert in a removal petition. This court previously declined to exercise supplemental jurisdiction over this case following the elimination of the basis for federal jurisdiction which prompted the original removal. There is no more reason to do so now than before, and therefore, the court will grant plaintiffs' motion to remand.

Based on the foregoing, it is ordered that plaintiff's motion to dismiss the FDIC is granted, and the claims of those plaintiffs who had claims only against NetBank (and hence its receiver) will also be dismissed. It is further ordered that plaintiff's motion to remand is granted.

SO ORDERED this 6th day of June, 2008.

/s/ Tom S. Lee
United States District Judge

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[10] The court notes that plaintiffs have presented exhibits which show that after the case was remanded the first time, the defendants filed motions to sever with the state court arguing that the plaintiffs had misjoined their claims and misjoined defendants. Their motion was denied. They sought to appeal, but the Mississippi Supreme Court denied their petition.

**APPENDIX D**

IN THE UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

[Filed November 10, 2009]

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Case No. 08-60674

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AMERUS LEASING, INC., *et al.*,
*Defendants-Appellants,*

vs.

GLENN ALLEN ADAIR dba SUPER D 229; *et al.*,
*Plaintiffs-Appellees.*

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI HONORABLE TOM S. LEE, DISTRICT JUDGE

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APPELLEES' MOTION TO DISMISS USURY CLAIMS

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IN THE UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

[Filed November 10, 2009]

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Case No. 08-60674

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AMERUS LEASING, INC., *et al.*,
*Defendants-Appellants,*

vs.

GLENN ALLEN ADAIR dba SUPER D 229; *et al.*,
*Plaintiffs-Appellees.*

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# CERTIFICATE OF INTERESTED PERSONS

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The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

## A. PARTIES

Appellees and their affiliates, if any:[1]

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[1] One hundred and twelve of the 144 parties named as Plaintiffs in the First Amended Complaint have now settled their claims and have been dismissed from this action leaving 32 remaining Plaintiffs. The following list includes the parties who remain as Plaintiffs at this time. In the First Amended Complaint there were approximately 130 contract transactions at issue. Today, there are still 22 contract transactions at issue in this action. There are more Plaintiffs than contracts because some individual Plaintiffs are parties as guarantors for their corporations.

Glenn Allen Adair d/b/a Super D #229

Jim Bain

Jim Bain's Pharmacy, Inc.

William J. Bell, Jr.

Macon City Drug, Inc. d/b/a City Drug Store

Charles Best d/b/a Martens Drug Store

Charles Boggan

Decatur Drugs, Inc. d/b/a Wheeler Drug Store

Billie James Bonner d/b/a Bonner's Pharmacy

Randy Calvert

Brent's Drugs, Inc.

Dwight Carr d/b/a Carr's Discount Drugs

Kenny G. Coleman d/b/a Coleman's Health Mart Pharmacy

Ann Devoe

Gathright-Reed Drug Company, Inc.

Michael E. Duran

Nana's, Inc. d/b/a Duran Drug Company

James E. Gable

Southern Drug Store, Inc. d/b/a Southern Drug

Lawrence Holden

Pearl River Drug Company, Inc.

Richard Hunt

Mr. Discount Drugs of Forest, Inc.

James L. Jelks, Jr. d/b/a Centreville Drugs

Donald G. Kitchens

Wilson Drug Company of Corinth, Inc. d/b/a Kitchens Drug

Super Sav-On Drugs of America, Inc.

Timothy L. Liddy d/b/a Liddy's Healthmart Pharmacy

James A. May

May's Pharmacy, Inc. d/b/a May's Pharmacy and d/b/a Coldwater Pharmacy

Robert L. Mays d/b/a Ripley Drug Company

Larry Melton d/b/a Ashland Discount Drug

None of the foregoing Plaintiffs/Appellees who are corporations have any parent corporations. No publicly held corporation owns 10% or more of the stock of any of the Plaintiffs/Appellees who are corporations.

Defendants-Appellants and their known affiliates, if any:

BancorpSouth Bank, f/k/a Bank of Mississippi d/b/a First Continental Leasing and Volunteer Bank - Defendants-Appellants

Buel H. Humphreys - Defendant

Thomas M. Kidd - Defendant

C. Max Tullos, Jr. - Defendant

Lease Partners Corp. and Lease Partners Finance Corp. – Defendants

Lease Partners, Inc. - Defendant-Appellant

First Bank Richmond, N.A., f/k/a First Bank Richmond, S.B., d/b/a First Federal Leasing - Defendant-Appellant

B. COUNSEL

Counsel for Plaintiffs-Appellees:

Paul N. Davis

Erin P. Lane

Butler, Snow, O'Mara, Stevens & Cannada, PLLC

Counsel for Defendants-Appellants:

J. Patrick Caldwell, Esq.
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Counsel for Bank of Mississippi d/b/a First Continental Leasing and Volunteer Bank

Vincent T. Borst, Esq.
ASKOUNIS & BORST, P.C.
Counsel for Lease Partners Corp. and Lease Partners Finance Corp.

Roy H. Liddell, Esq.
Trey C. Dellinger, Esq.
WELLS, MARBLE & HURST, PLLC
Counsel for Lease Partners, Inc. and First Bank Richmond, N.A.

This the 10th day of November, 2009.

/s/ Paul N. Davis
Paul N. Davis

## APPELLEES' MOTION TO DISMISS USURY CLAIMS

Come now Appellees, Plaintiffs in the district court below, and move this Court to dismiss two Counts in Appellees' First Amended Complaint, that is, Count VII: Usury on Time-Price Differential and Count VIII: Usury on Late Charges, and in support of this motion Appellees would show the Court as follows:

1. This is a state law fraud, negligence, breach of contract and usury action brought by a number of Mississippi pharmacies, pharmacists, veterinarians and veterinary clinics against a number of finance companies and individual salesmen relating to the purchase of electronic advertising boards and kiosks.

2. Appellees commenced this action on February 14, 1996, in Mississippi state court after learning that the purchase transactions were part of a huge pyramid or Ponzi scheme in which the finance company defendants were knowing participants.

3. After a long procedural history involving years in multidistrict litigation, two lengthy bankruptcies, a previous discretionary remand order affirmed by this Court, and two interlocutory appeals to the Mississippi Supreme Court, this case was finally set for trial on November 26, 2007. However, some six weeks before trial the FDIC, as receiver for defendant NetBank, intervened, substituted itself for NetBank, and removed this case to federal court again.

4. Appellees promptly moved to dismiss all claims against the FDIC because it was clear the receivership estate would have no assets from which to recover a judgment. Appellees also moved to remand to state court again since that court had already ruled on all dispositive motions and was ready for

trial. The district court dismissed the FDIC. Then, just as with the first removal, the district court exercised its discretion and remanded the case.

5. The Panel decision in this Court reversed the remand order based on the interpretation of two Panel members that *FSLIC v. Griffin*, 524 F.3d 627, 696 (5th Cir. 1991) precluded the district court from exercising discretion to remand state law claims against parties unrelated to the FDIC, even though neither the FDIC nor its successor remains as a party at this time.

6. The third Panel member, Judge Jolly, disagreed with the other Panel members' interpretation but nevertheless expressed the view that the remand order needed to be reversed because there remain pending two federally-preempted usury claims which he believes cannot be remanded even though the usury claims were non-removable.

7. Simultaneously with the filing of this motion, Appellees' are filing a Petition for Panel Rehearing and a separate Petition for Rehearing En Banc.

8. Without regard to whether this Court grants either Petition, Appellees desire to dismiss both of these two usury claims with prejudice.

9. At the time this action was commenced in 1996, Appellees believed that these usury claims were significant claims that arose solely under state law. Subsequently, the United States Supreme Court issued its opinion in *Beneficial Nat. Bank v. Anderson*, 539 U.S. 1, 123 S.Ct. 2058 (2003), holding that usury claims such as those asserted herein by Appellees are completely preempted by federal law.

10. While Appellees' usury claims have never been dismissed, the significance of these claims eroded vastly during the course of discovery in this case during which Plaintiffs' fraud claims became the central focus and remains so today.

11. The *Anderson* decision further called into question the practical viability of the usury claims since the allowable rate of interest is no longer limited to the state law under which Appellees were originally claiming. Thus, under 12 U.S.C. § 85, the transactions do not appear to be usurious in any event. Moreover, due to preemption, 12 U.S.C. § 86 places a two year statute of limitations on the usury claims from the date of the transactions at issue. Sixteen of the twenty-two transactions remaining at issue occurred more than two years before suit was filed. Thus, these claims should be dismissed in any event because they are barred.

12. During the oral argument before the Panel, Appellees committed unconditionally that they will dismiss the usury claims with prejudice.

13. Appellees are filing this motion in order to leave no doubt in the record before this Court that Appellees are unconditionally committed to dismissing the usury claims from this case with prejudice.

14. Appellees do not condition their desire to dismiss these usury claims in any way on the outcome of either of their Petitions for Rehearing. However, Appellees do want to make sure the Court is aware that the only remaining claims that Appellees will be prosecuting in this case from here forward are purely state law claims.

15. Appellees have consulted with counsel for Appellants to determine whether they oppose this

motion. Counsel for two of the Appellants have informed the undersigned that they intend to oppose this motion.

WHEREFORE, PREMISES CONSIDERED, Appellees pray that this Court will enter an order dismissing Appellees' usury claims, Counts VII and VIII of the First Amended Complaint, with prejudice.

This the 10th day of November, 2009.

Respectfully submitted,

By: Paul N. Davis
Paul N. Davis (MSB #8638)
Erin P. Lane (MSB #100023)

*Attorneys for Plaintiffs-Appellees*

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## APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed December 1, 2009]

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No. 08-60674

---

GLENN ALLEN ADAIR, doing business as Super D #229; DALLAS LITTLE, doing business as Little's Pharmacy; SOUTHERN DISCOUNT DRUGS OF CHARLESTON, doing business as Southern Discount Drugs/Robert T Salmon; MAY'S PHARMACY, doing business as Coldwater Pharmacy/James A May; ANIMAL MEDICAL CENTER OF ELLISVILLE, INC; *et al.*,
*Plaintiffs-Appellees,*

vs.

LEASE PARTNERS, INC; BANCORPSOUTH BANK,
*Defendants-Appellants,*

FIRST BANK RICHMOND, S B, doing business as First Federal Leasing and Interstate Financial,
*Appellant.*

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Appeals from the United States District Court for the Southern District of Mississippi, Jackson

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Before REAVLEY, JOLLY and WIENER, *Circuit Judges.*

PER CURIAM:

IT IS ORDERED that appellees' motion to dismiss appeal as to usury claims, Counts VII and VIII of the First Amended Complaint, is denied at this time.

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(2)

No. 09-1125

Supreme Court, U.S.
FILED
APR 19 2010
OFFICE OF THE CLERK

In The
# Supreme Court of the United States

GLENN ALLEN ADAIR d/b/a SUPER D 229, *et al.*,

*Petitioners,*

vs.

AMERUS LEASING, INC., *et al.*,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## BRIEF IN OPPOSITION OF LEASE PARTNERS, INC. AND FIRST BANK RICHMOND, N.A.

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April 19, 2010

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## QUESTION PRESENTED

The suit at bar was removed by the FDIC to the United States District Court, with jurisdiction based on 12 U.S.C. §1819(b)(2), which provides that "all suits of a civil nature" to which the FDIC "is a party" shall be "deemed to arise under the laws of the United States." After removal, the FDIC and Plaintiffs claiming against it were dismissed. The District Court then exercised a claimed discretion to remand the action to the state court. On appeal, the Fifth Circuit held that 12 U.S.C. §1819(b)(2) provided the District Court with original subject matter jurisdiction upon intervention and removal by the FDIC; that this jurisdiction was not altered by the post-removal dismissal of the FDIC; and that the District Court did not have discretion to remand a case over which it possessed original jurisdiction.

The question presented is this: Did the Fifth Circuit correctly decide that, upon intervention and removal by the FDIC, the District Court acquired original subject matter jurisdiction over the entire suit under 12 U.S.C. §1819(b)(2); that this original subject matter jurisdiction was determined at the time of filing and persisted after the post-removal dismissal of the FDIC; and, accordingly, that the District Court had no discretion to remand an action over which it possessed original subject matter jurisdiction?

## CORPORATE DISCLOSURE STATEMENT

Respondent First Bank Richmond, N.A. is owned by Richmond Mutual BanCorp. Inc.

Anthem Financial, Inc. owns 100% of Respondent Lease Partners, Inc.

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## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Art. III, Section 2, Clause 1 of the United States Constitution provides in pertinent part:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . . – To Controversies to which the United States shall be a Party; . . .

Title 12, Chapter 16 of the United States Code, provides for original federal jurisdiction of cases in which the Federal Deposit Insurance Corporation (the "Corporation" or "FDIC") is a party, and provides in pertinent part at 12 U.S.C. §1819(a) (First, Fourth and Ninth):

> Upon June 16, 1933, the Corporation shall become a body corporate and as such shall have power – . . .
>
> . . . To sue and be sued, and complain and defend, by and through its own attorneys, in any court of law or equity, State or Federal [and] . . .
>
> . . . To act as a receiver[.]

The statute further provides in pertinent part at 12 U.S.C. §1819(b)(2)(A):

> (A) In general
>
> Except as provided in subparagraph (D), all suits of a civil nature at common law or in

> equity to which the Corporation, in any capacity, is a party shall be deemed to arise under the laws of the United States.

Concerning removal, 12 U.S.C. §1819(b)(2)(B) provides:

> (B) Removal
>
> Except as provided in subparagraph (D), the Corporation may, without bond or security, remove any action, suit or proceeding from a State court to the appropriate United States district court before the end of the 90-day period beginning on the date the action, suit, or proceeding is filed against the Corporation or the Corporation is substituted as a party.

Concerning certain State actions involving the FDIC for which original federal jurisdiction is not provided, 12 U.S.C. §1819(b)(2)(D) provides:

> (D) State actions
>
> Except as provided in subparagraph (E), any action–
>
> (i) to which the Corporation, in the Corporation's capacity as receiver of a State insured depository institution by the exclusive appointment by State authorities, is a party other than as a plaintiff;
>
> (ii) which involves only the preclosing rights against the State insured depository institution, or obligations owing to, depositors, creditors, or stockholders by the State insured depository institution; and

(iii) in which only the interpretation of the law of such State is necessary,

shall not be deemed to arise under the laws of the United States.

## STATEMENT OF THE CASE

The plaintiffs in this case, a group of individual pharmacists, pharmacies, veterinarians and veterinary clinics ("Plaintiffs" or "Petitioners"), sued individual salesmen and different financial institutions in Mississippi state court, alleging state law fraud, negligence, breach of contract and usury claims. (Pet. App. at 2a.) The claims arise from the Plaintiffs' leasing of electronic advertising equipment for display in their various places of business. (*Id.*) During the state court litigation, the FDIC entered the case after being appointed receiver for NetBank, a successor bank to one of the original defendants, by the Office of Thrift Supervision. (Pet. App. at 2a; Resp. App. at 7a.) The FDIC removed the suit to the United States District Court, with jurisdiction based on 12 U.S.C. §1819(b)(2). (Pet. App. 2a.) After removal, Plaintiffs moved to dismiss the FDIC on the ground that federal law provided that the claims of NetBank depositors had priority over the claims of the Plaintiffs; thus, Plaintiffs had no possibility of recovery against the FDIC. (Resp. App. at 10a.) Plaintiffs also filed a motion to remand to state court. (Pet. App. at 2a.) The District Court granted Plaintiffs' motion to dismiss the FDIC and granted Plaintiffs' motion to

remand. (*Id.*) The District Court held that no original federal jurisdiction remained over Plaintiffs' remaining claims and that it retained only supplemental jurisdiction over those claims. (Pet. App. at 2a-3a.) The District Court's remand was based on its perception that it had discretion to decline to exercise jurisdiction over what it viewed as predominately state law claims. (Pet. App. at 3a.) The Defendants appealed the remand order to the Fifth Circuit Court of Appeals. (*Id.*)

The Fifth Circuit determined that the FDIC's initial involvement gave the District Court original subject matter jurisdiction over the entire action, including jurisdiction over those claims not involving the FDIC. (*Id.* at 6a) (citing *Buchner v. FDIC*, 981 F.2d 816, 819 (5th Cir. 1993)). The Fifth Circuit next examined the effect on that jurisdiction of the FDIC's dismissal. The Fifth Circuit held that subject matter jurisdiction is determined at the time of removal and is not ousted by post-removal events. (Pet. App. at 13a) (citing *Federal Sav. & Loan Ins. Corp. v. Griffin*, 935 F.2d 691, 696 (5th Cir. 1991), *cert. denied*, 502 U.S. 1092, 112 S.Ct. 1163, 117 L.Ed.2d 410 (1992).

Because the District Court continued to have original subject matter jurisdiction after dismissal of the FDIC, the Fifth Circuit determined that the District Court did not have discretion to remand an action over which it possessed original subject matter jurisdiction. (*Id.* at 14a) (citing *Buchner*, 981 F.2d at 821) (itself citing *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 345 (1976)).

The fact that neither the FDIC nor any successor entity remains in this case raises, at most, only a surface novelty. This Court need break no new ground to answer the question presented. Rather, this Court's settled precedents provide answer enough.

This Court held as long ago as 1942 that the FDIC's charter gives the federal district courts original subject matter jurisdiction over cases involving the FDIC.[1] This Court has held since at least 1824 that jurisdiction is determined at the time of filing and is not divested by subsequent events.[2] This Court held as early as 1976 that district courts do not have discretion to decline to exercise original jurisdiction.[3]

These settled precedents, when applied to the facts of this case, lead inexorably to the conclusion that intervention and removal by the FDIC gave the District Court original subject matter jurisdiction over this entire action; that that jurisdiction was not divested by the post-removal dismissal of the FDIC;

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[1] *American National Red Cross v. S.G. and A.E.*, 505 U.S. 247, 253 (1992) (characterizing this Court's holding in *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 455-56 (1942) as establishing that the FDIC's charter gives the federal courts original subject matter jurisdiction over cases involving the FDIC).

[2] *See Freeport McMoRan, Inc. v K N Energy, Inc.*, 498 U.S. 426, 428 (1991) (*per curiam*) ("We have consistently held that if jurisdiction exists at the time an action is commenced, such jurisdiction may not be divested by subsequent events.") (citing *Mollan v. Torrance*, 9 Wheat. 537, 6 L.Ed. 154 (1824))

[3] *Thermtron*, 423 U S. at 345.

and thus, that the District Court did not have discretion to remand the remaining claims, over which it continued to possess original jurisdiction.

The question presented is answered by the settled precedents of this Court. The petition for writ of certiorari presents no novel issues. It does not warrant this Court's attention, and should be denied.

## REASONS FOR DENYING THE PETITION

### I. 12 U.S.C. §1819 GIVES THE DISTRICT COURT ORIGINAL JURISDICTION OVER THE ENTIRE ACTION, INCLUDING JURISDICTION OVER CLAIMS NOT INVOLVING THE FDIC.

This Court held as long ago as 1942 that the FDIC's charter, now codified in 12 U.S.C. §1819, gives the federal district courts *original* subject matter jurisdiction over cases involving the FDIC. *American National Red Cross,* 505 U.S. at 253 (1992) (characterizing this Court's 1942 holding in *D'Oench, Duhme & Co.*, 315 U.S. at 455-56 as establishing that the FDIC's charter gives the federal courts original subject matter jurisdiction over cases involving the FDIC).

Moreover, the plain language of 12 U.S.C. §1819 makes clear that the initial involvement of the FDIC gave the District Court original subject matter jurisdiction over the entirety of this action. The statute provides that "all *suits* of a civil nature at common

law or in equity to which the Corporation, in any capacity, is a party *shall be deemed to arise under the laws of the United States*" and that the FDIC may remove "any *action, suit or proceeding*" to federal district court. 12 U.S.C. §1819(b)(2)(A)-(B) (emphasis supplied). The Fifth Circuit below found, consistent with this Court's holding in *American National Red Cross*, that the FDIC's involvement gave the district court original federal jurisdiction over *the entire suit*, not just over component claims involving the FDIC:

> Pursuant to §1819(b)(2)(A), all suits to which the FDIC is a party and all component claims in those suits are '*conclusively* presumed to arise under the laws of the United States, and thus . . . within original subject matter jurisdiction of the proper federal district court.' Because a suit and all its component claims are conclusively deemed to arise under federal law once the FDIC is a party, §1819(b)(2) provides jurisdiction over suits whose causes of action may otherwise largely depend on state law and which may not otherwise be subject to federal-question jurisdiction under the general federal-question statute of 28 U.S.C. §1331.

(Pet. App. at 6a) (quoting *Buchner*, 981 F.2d at 819 (emphasis supplied by *Adair* court) and citing *In re Meyerland Co.*, 960 F.2d 512, 514-15 (5th Cir. 1992) (*en banc*)); *see also Griffin*, 935 F.2d at 697.

Additionally, cases in the Third, Eighth and Ninth Circuits considering jurisdiction in cases involving the FDIC under 12 U.S.C. §1819(b)(2), or the RTC

under the nearly identical 12 U.S.C. §1441a(*l*)(1), have reached the same conclusion as the Fifth Circuit in *Buchner* and *Griffin*. Those cases conclude that, once the FDIC or RTC becomes a party, the district court has original subject matter jurisdiction over the entire case under 12 U.S.C. §1819(b)(2) (FDIC) or 12 U.S.C. §1441a(*l*)(1) (RTC). These cases hold that the district court possesses *original subject matter jurisdiction over the entire case*, including claims not involving the federal entity. In other words, the jurisdiction is *original jurisdiction* under section 1819(b)(2) (FDIC) and 1441a(*l*)(1) (RTC), *not merely supplemental jurisdiction* under 28 U.S.C. §1367. *See Kansas Public Employees Retirement System v. Reimer & Koger Assoc., Inc.* (*KPERS*), 77 F.3d 1063, 1067 (8th Cir. 1996) (because RTC was a party, court has arising-under jurisdiction under 12 U.S.C. §1441a(*l*)(1), rather than supplemental jurisdiction, even over the claims that do not involve the RTC); *Brockman v. Merabank*, 40 F.3d 1013, 1015-16 (9th Cir. 1994) (holding that the term "suit" in §1441a(*l*)(1) includes all claims in a case, and that the addition of RTC to the action "transformed the entire suit into one that arose under federal law.") (citation omitted); *Spring Garden Assoc. v. RTC*, 26 F.3d 412, 415-16 (3rd Cir. 1994) (same).

As the foregoing authorities demonstrate, the FDIC's initial involvement gave the District Court original subject matter jurisdiction over the entire action under 12 U.S.C. §1819, including jurisdiction of claims not involving the FDIC.

## II. THE FIFTH CIRCUIT FOLLOWED THIS COURT'S SETTLED PRECEDENT THAT JURISDICTION IS DETERMINED AT THE TIME OF REMOVAL. THUS, THE FIFTH CIRCUIT CORRECTLY HELD THAT THE LATER DISMISSAL OF THE FDIC DID NOT DIVEST THE DISTRICT COURT'S ORIGINAL JURISDICTION OVER THIS CASE.

After determining the district court had original subject matter jurisdiction over the entire action upon intervention and removal by the FDIC, the Fifth Circuit below decided that the subsequent dismissal of the FDIC did not oust the court's original subject matter jurisdiction over the remaining claims. (Pet. App. at 12a-13a.) The Fifth Circuit's basis for this holding was the principle that jurisdiction is assessed at the time of filing (or at the time of removal), and is not ousted by subsequent events. (*Id.*) (citing *Griffin*, 935 F.2d at 696).

This principle, commonly referred to as the "time of filing rule," has been adhered to by this Court in cases both venerable and modern. *See Freeport McMoRan, Inc. v. K N Energy, Inc.*, 498 U.S. 426, 428 (1991) (*per curiam*) ("We have consistently held that if jurisdiction exists at the time an action is commenced, such jurisdiction may not be divested by subsequent events.") (citing this Court's 1824 decision in *Mollan*, 6 L.Ed. 154); *see also Clarke v. Mathewson*, 37 U.S. 164, 167 (1838) (same); *St. Paul Mercury Indemnity Co. v. Red Cab*, 303 U.S. 283, 289-90 (1938)

("Events occurring subsequent to the institution of suit which reduce the amount recoverable below the statutory limit do not oust jurisdiction.").

Moreover, application of the time of filing rule has not been limited to cases involving diversity jurisdiction. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 569 (1992) (upheld the time of filing rule in rejecting the idea that the standing of parties, who were added after litigation began, could create a sufficient case or controversy for Art. III jurisdiction even if the original plaintiffs lacked standing); *McLain v. Anderson*, 567 F.3d 956, 965 (8th Cir. 2009) (in an action removed to district court based on federal question jurisdiction under the Employee Retirement and Income Security Act, court held that jurisdiction depends upon facts existing at time of filing and may not be divested by subsequent events); *Seawright v. Greenberg*, 233 Fed. Appx. 145, 147-48 (3rd Cir. 2007) (federal question jurisdiction is assessed at time of removal, subsequent events do not divest federal question jurisdiction); *Libhart v. Santa Monica Dairy Co.*, 592 F.2d 1062, 1064 (9th Cir. 1979) (applying time-of-filing rationale to federal question case); *Harrison v. Provident Life & Accident Ins. Co.*, 26 F.3d 930, 932 (9th Cir. 1994) (same).

Indeed, the time of filing rule has been adhered to in other Circuits in cases involving the FDIC and the RTC. *KPERS*, 77 F.3d at 1067-68 (existence of jurisdiction under 12 U.S.C. §1441a(*l*)(1) determined at time of removal, subsequent dismissal of RTC did not impair jurisdiction); *Casey v. FDIC*, 583 F.3d 586,

591 (8th Cir. 2009) (following *KPERS* in holding that all claims in a case involving the FDIC arise under federal subject matter jurisdiction under 12 U.S.C. §1819(b)(2); thus, subsequent dismissal of the FDIC did not impair that jurisdiction); *FDIC v. Four Star Holding Co.*, 178 F.3d 97, 100 (2nd Cir. 1999) (existence of jurisdiction under 12 U.S.C. §1819(b)(2) determined at time of filing; thus, original federal subject matter jurisdiction remained despite transfer of assets by FDIC to private third party).

Petitioners argue that, by wording §1819(b)(2) to state that all suits to which the FDIC "is a party" arise under federal law, Congress intended for that statute to provide no jurisdiction after dismissal of the FDIC. (Pet. Brief at 10-12, 19-21.) Petitioners further argue that the Fifth Circuit's position has created a split between the circuits on this issue. (*Id.* at 19-21.) However, of the other Circuit cases cited by Petitioners as squarely disagreeing with the Fifth Circuit, only one contains any detailed analysis of these jurisdictional issues.[4]

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[4] The cases cited by Petitioners from other circuits shed little light on the question presented, as they contain little or no analysis of the pertinent issues; rather, they simply assert their jurisdictional conclusions axiomatically.

In *Myers v. Moore Engineering, Inc.*, 42 F.3d 452, 454 (8th Cir. 1994), the 8th Circuit upheld a district court's denial of a motion to remand under a case removed under 12 U.S.C. §1441(a), which contains language similar to that involved in 12 U.S.C. §1819(b)(2). The appellants in *Myers* argued that the district court abused its discretion in remanding the case, 42 F.3d

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at 454; however, there is no indication that the appellants in *Myers* argued that the district court did not *have* discretion, which was the argument advanced by the Appellants and accepted by the Fifth Circuit in this case. The *Myers* court provided no analysis supporting its assumption that the district court had discretion to remand.

Similarly, in *Bank of Oklahoma v. Islands Marina, Ltd.*, 918 F.2d 1476, 1479-80 (10th Cir. 1990), the Tenth Circuit held that, after dismissal of FSLIC in a case removed under 12 U.S.C. §1730(k)(1), the district court did not abuse its discretion in retaining the claims remaining after dismissal of FSLIC. As with *Myers*, there is no indication that the party opposing remand argued that the district court did not *have* discretion to remand the case. Likewise, this case provides no analysis supporting the assumption that the district court possessed discretion to remand.

*Mizuna, Ltd. v Crossland Federal Savings Bank*, 90 F.3d 650 (2nd Cir. 1996) also provides no useful analysis of the jurisdictional issues in question. *Mizuna* involved removal of an action by the FDIC under §1819(b)(2). 90 F.3d at 654-55. After the dismissal of the FDIC and the financial institution of which it had accepted conservatorship, the district court asserted jurisdiction and ruled on the merits. *Id.* The Second Circuit upheld the district court's assertion of jurisdiction over the claims remaining after dismissal of the FDIC and its ward bank. *Id.* at 657. The Second Circuit asserted axiomatically, without analysis, that the district court had supplemental jurisdiction after dismissal of the FDIC. *Id.* at 657. The court cited no authorities interpreting 12 U.S.C. §1819 in support of this conclusion. *Id.* *Mizuna* sheds little light on what kind of jurisdiction persists after dismissal of the FDIC. Indeed, as will be discussed *infra*, the bulk of the analysis in *Mizuna* deals with the court's determination that the district court's assertion of jurisdiction after dismissal of the FDIC did not exceed the constitutional boundaries of "arising under" jurisdiction under Art III of the Constitution.

Petitioners also cite an unpublished decision, *Diehl v. FDIC*, 1994 WL 68239, *2 (9th Cir. 1994) in support of their position.

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In *New Rock Asset Partners, L.P. v. Preferred Entity Advancements, Inc.*, the RTC filed a case in federal court pursuant to 12 U.S.C. §1441a(*l*)(1). 101 F.3d 1492, 1495 (3rd Cir. 1996). The RTC then sold its interests to a private third party and was dismissed from the case. *Id.* The Third Circuit determined that the district court did not have continuing jurisdiction over the claims remaining after dismissal of the RTC. *Id.* at 1499-1504. The court examined the wording of §1441a(*l*)(1), which stated that "any civil action, suit, or proceeding to which the [RTC] *is* a party shall be deemed to arise under the laws of the United States. . . ." *Id.* at 1499 (emphasis supplied). The court commented that the language of the statute did not clearly decide the issue of continuing jurisdiction, nor did the murky legislative history. *Id.* at 1499-1500. The court opined that the purpose of the statute was to resolve failed thrifts and to dispose of their assets. *Id.* at 1500-01. The court speculated that, by wording the statute to state that the district court would have original jurisdiction over cases in which the RTC "*is* a party," Congress intended that

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As an unpublished decision, it has no precedential value. *Id.* at *2, n.** Regardless, as with the previously discussed authorities, *Diehl* provides no reasoned explanation of the Ninth Circuit panel's assumption that the district court had only supplemental jurisdiction over the claims remaining after dismissal of the FDIC, nor does the *Diehl* court cite any authority interpreting 12 U.S.C. §1819(b)(2) in support of that assumption. *Diehl* is not helpful in deciding the question presented here.

jurisdiction would cease once the RTC was dismissed. *Id.* at 1501 (emphasis supplied).

*New Rock* cited scant authority for its determination the statute's present tense "is a party" phrasing indicated that jurisdiction under §1441a(*l*)(1) would evaporate upon dismissal of the RTC. The weakness of the *New Rock* rationale becomes clear when one considers how this Court has interpreted the similar present tense phrasing of the most widely used federal jurisdiction provision, the diversity jurisdiction statute. That statute provides the district courts with original jurisdiction of "all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and *is* between . . . citizens of different States[.]" 28 U.S.C. §1332(a) (emphasis supplied). Applying the reasoning of *New Rock* to the wording of the diversity statute would mean that a post-removal change in citizenship resulting in incomplete diversity would destroy diversity jurisdiction (i.e., at that point the controversy no longer "is" between citizens of different states). Yet, notwithstanding the diversity statute's use of the present-tense "is," this Court has consistently held that a post-removal change in citizenship of the parties in a diversity case will not divest the Court of original jurisdiction, *because jurisdiction is determined at the time of filing*. *See supra*. Surely Congress, in using the present tense "is a party" phrasing in §1819(b)(2), presumed that that the use of the word "is" would be interpreted by the federal courts in the same way it had been with the diversity statute, i.e.,

that jurisdiction would be determined at the time of removal and would not be divested by post-removal events. *See Cannon v. Univ. of Chicago*, 44 U.S. 677, 696-98 (1979) (when the court attempts to discern Congress' intent in drafting a statute, Congress is presumed to know how the federal courts previously interpreted similarly worded statutes). There is no reason to expect that Congress intended, by using present tense phrasing in §1819(b)(2), for district courts to reevaluate the jurisdictional footing at every stage of the proceedings.

Respondents respectfully submit that *New Rock* is the only Circuit decision outside the Fifth Circuit that thoroughly analyzed the jurisdictional issues *sub judice* and reached a result contrary to the Fifth Circuit. *New Rock* is inconsistent with this Court's settled precedents, which hold that the involvement of the FDIC gives a district court *original* subject matter jurisdiction over the entire case – jurisdiction which is not divested by a post-removal event such as dismissal of the FDIC.

## III. UNDER *THERMTRON PRODUCTS, INC. V. HERMANSDORFER* AND *CARNEGIE-MELLON UNIV. V. COHILL*, A DISTRICT COURT DOES NOT HAVE DISCRETION TO REMAND CASES OVER WHICH IT HAS ORIGINAL JURISDICTION. THUS, THE FIFTH CIRCUIT CORRECTLY HELD THAT THE DISTRICT COURT DID NOT HAVE DISCRETION TO REMAND THIS ACTION.

Having determined that the FDIC's initial involvement provided continuing *original* subject matter jurisdiction over all the claims in this case under 12 U.S.C. §1819(b)(2), the Fifth Circuit below held that remand of any claim was inappropriate. (Pet. App. at 12a-13a.) In doing so, the Fifth Circuit relied on its decision in *Buchner*, which in turn relied on this Court's decision in *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976).

In *Buchner*, the Fifth Circuit considered an appeal challenging a federal district court's order remanding a case to state court that had been removed under 12 U.S.C. §1819(b)(2). *Buchner*, following *Thermtron*, held that a district court has no discretion to remand cases over which it possesses original subject matter jurisdiction under 12 U.S.C. §1819. *See Buchner*, 981 F.2d at 820-21 (citing *Thermtron*, 423 U.S. at 345 (district court does not have discretion to remand a case on grounds not expressly permitted by the controlling statute)).

The Fifth Circuit noted in *Buchner* that there were only four sources of a district court's authority to

remand a case: 1) a district court has authority to remand all matters in which state law predominates under 28 U.S.C. §1441(c); 2) a district court must remand a case in response to a timely motion demonstrating a defect in removal procedure; 3) the district court must remand a case over which it has no subject matter jurisdiction; and 4) a district court may remand a case in which state law predominates. The court found that there was no applicable procedural defect and there was no lack of subject matter jurisdiction. *Id.* at 819-820. As to §1441(c), the court found, under 12 U.S.C. §1819:

> [I]f a case is removed from state court on the basis of federal question jurisdiction and that case also includes state law claims, §1441(c) allows the district court to decide the entire case or, in its discretion, to remand all matters in which state law predominates. As the FDIC is a party to the present suit, *all* of the component claims are *conclusively* deemed to have arisen under federal law. And, as §1441(c) authorizes the federal district court to remand only those matters in which state law predominates, *this discretionary remand provision is inapplicable to the instant action* . . . the Buchners' claims are treated as arising under federal law; therefore, the district court has *original subject matter jurisdiction* of this case under 28 U.S.C. §1331.

981 F.2d at 819 (emphasis supplied).

*Buchner* went on to hold that the district court had no discretion to remand under *Carnegie-Mellon University v. Cohill*, 484 U.S. 343, 347 (1988). The *Buchner* court noted that *Cohill* merely stands for the proposition that, when all federal question claims have been dismissed from a removed action, the district court has discretion to remand the remaining state law claims over which it had previously exercised only pendent jurisdiction (now codified as "supplemental" jurisdiction under 28 U.S.C. §1367). 981 F.2d at 820 (citing 484 U.S. at 357). Remand authority under *Cohill* was explicitly limited to cases involving pendent state law claims. 484 U.S. at 355, n. 11 ("The remand power that we recognize today derives from the doctrine of pendent jurisdiction and *applies only to cases involving pendent claims.*") (emphasis supplied). Because remand authority under *Cohill* was limited to pendent claims, that case did not provide authority to remand any claim over which the district court possessed *original* subject matter jurisdiction. 981 F.2d at 820. As the *Buchner* court had held that the district court had original subject matter jurisdiction over the *entire case*, including claims not involving the FDIC, the court held *Cohill* did not give the district court discretion to remand claims not involving the FDIC. *Id.*

Here, just as in *Buchner*, the district court's jurisdiction over the claims remaining after the dismissal of the FDIC was *original* subject matter jurisdiction under 12 U.S.C. §1819, *not supplemental* jurisdiction under 28 U.S.C. §1367. *See Brockman v. Merabank*,

40 F.3d 1013, 1015-17 (9th Cir. 1994) (where jurisdiction is "original" jurisdiction, rather than supplemental jurisdiction under 28 U.S.C. §1367(a), the district court has no discretion to remand under 28 U.S.C. §1367(c)); *Spring Garden Associates, L.P. v. RTC*, 26 F.3d 412, 415-17 (3rd Cir. 1994) (Presence of RTC as a party gave district court original subject matter jurisdiction over entire case, including claims not involving the RTC under 12 U.S.C. §1441a(*l*)(1); thus, appellate court did not need to address whether the district court had pendent jurisdiction over claims not involving FDIC. Moreover, because all claims in the action were deemed to arise under federal law under 12 U.S.C. §1819(b)(2), there were no separate and independent "state law claims" left to predominate, thus, remand was not permitted under 28 U.S.C. §1441(c).).

Having determined that the FDIC's initial involvement gave the district court *original* subject matter jurisdiction over the entire case, and that jurisdiction is determined at the time of removal and may not be divested by subsequent events such as the dismissal of the FDIC, the Fifth Circuit's ultimate conclusion necessarily followed. Under *Thermtron* and *Cohill*, a district court may not remand cases over which it possesses original subject matter jurisdiction.[5]

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[5] It is worthy of note that, although a district court has no discretion to remand a case after intervention and removal of

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## IV. PETITIONER'S ARGUMENT THAT THE FIFTH CIRCUIT'S INTERPRETATION OF 12 U.S.C. §1819 STRETCHES BEYOND THE JURISDICTION PROVIDED BY ART. III MAY NOT BE RAISED FOR THE FIRST TIME IN THEIR PETITION. REGARDLESS, THE FIFTH CIRCUIT'S INTERPRETATION OF THE STATUTE DOES NOT EXCEED CONSTITUTIONAL LIMITS.

Where issues were not considered by a United States Court of Appeals, the United States Supreme Court will not ordinarily consider them. *Meyer v. Holley*, 537 U.S. 280, 291 (2003). Here, despite having briefed the appeal issues fully before the Fifth Circuit, and despite having filed petitions for both panel rehearing and rehearing *en banc*, the Petitioners have not asserted a constitutional issue until filing their petition for writ of certiorari. For this reason alone, this Court should disregard this argument advanced by the Petitioners.

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the FDIC, this does not mean that the district courts will be charged with the jurisdiction of every case that ever involves the FDIC. Congress specifically provided for considerations of comity to the state courts in drafting 12 U.S.C. §1819(b)(2)(D), which provides that state law actions meeting certain criteria will not be deemed to arise under the law of the United States. It is undisputed that this "state law exception" does not apply here, because the FDIC was appointed by a federal authority, the Office of Thrift Supervision. To find a discretion in the district courts to remand claims not embraced by this state law exception would upset the balance between federal and state jurisdictions established by Congress in the statute.

In any event, the Fifth Circuit's interpretation of 12 U.S.C. §1819 is well within Art. III "arising under" jurisdiction.

First, the presence of the FDIC as a party when this action was removed is sufficient to confer jurisdiction under Art. III. As this Court noted in *American National Red Cross*, "As long ago as *Osborn* [*v. United States*], this Court held that Article III's 'arising under' jurisdiction is broad enough to authorize Congress to confer federal-court jurisdiction over actions involving federally chartered corporations." 505 U.S. at 264-65 (citing *Osborn*, 9 Wheat. 738, 823-28, 6 L.Ed. 204 (1824)); *see also* the *Pacific Railroad Removal Cases*, 115 U.S. 1 (1885) (relying on *Osborn* to hold that every case, irrespective of its nature, brought by or against a federally chartered corporation is a suit arising under the laws of the United States). As the Fifth Circuit held in *In re Meyerland Co.*:

> Even if the only issues to be decided are ones of state law, Article III permits the exercise of jurisdiction if one of the parties is a federal corporation . . . Congress enacted 12 U.S.C. §1819 precisely so that the FDIC could enjoy federal question jurisdiction similar to that articulated in *Osborn* and the *Pacific Railroad Removal Cases*.

960 F.2d 512, 518-19 (1992).

Even if Art. III jurisdiction cannot be grounded under the rule laid down in *Osborn*, the FDIC's initial

involvement would, nevertheless, confer Art. III jurisdiction, because 12 U.S.C. §1819 is part of a

> comprehensive scheme comprising both pure jurisdictional provisions *and* federal law capable of supporting Art. III arising under jurisdiction . . . Although the particular case brought by [plaintiff] does not implicate principles of conservatorship or receivership under state or federal law, and raises no federal issue of any kind, we are satisfied that this particular jurisdictional grant is part of a comprehensive scheme enacted by Congress to serve and promote incontestibly federal goals on a comprehensive basis . . . the jurisdictional grant in §1819(b)(2)(A-B) falls within the ambit of cases where the whole purpose of the congressional legislative program requires the availability of federal jurisdiction.

*Mizuna*, 90 F.3d at 655-56 (concluding that district court had power to hear case under Art. III, despite absence of any federal law issue in the complaint or the answers) (citing *Mesa v. California*, 489 U.S. 121, 139 (1989) (internal quotations and citations omitted).

Lastly, even if *Osborn v. Haley*, 549 U.S. 225 (2007) has application to the Art. III issue in this case as Petitioners argue, the exercise of jurisdiction here would not exceed Art. III limits under the rule stated in that case. *Haley* held that where a significant federal question is raised *at the outset of a case*, the case "arises under" federal law as that term is used in

Art. III, even if only state law claims remain after resolution of the initial federal question. 549 U.S. at 244-45. In this case, multiple significant federal questions were raised at the time of removal. The FDIC raised federal defenses in its Amended Notice of Removal, stating that "12 U.S.C. Sections 1823(e), 1831d(a) and/or 12 U.S.C. Sections 85 and 86 and related statutes make alleged agreements enforceable only if in writing and preempt state law usury claims." (Resp. App. at 15a-17a.) Moreover, Petitioners' motion to dismiss the FDIC was based squarely on an issue of federal law:

> According to information published by the FDIC, the assets of NetBank are not sufficient to cover the uninsured deposits of the depositors of NetBank. *According to federal law*, the claims of NetBank depositors have priority over the claims of the Plaintiffs. Since as a practical matter there is no real possibility that Plaintiffs will be able to collect on any judgment they might obtain against FDIC, Plaintiffs desire to dismiss FDIC, as Receiver for NetBank[.]

(Resp. App. at 6a.) (emphasis supplied) (the priority provision of federal law which the Petitioners referred to in their motion to dismiss the FDIC is 12 U.S.C. §1821(d)(11), the National Depository Preference Act). Because multiple significant issues of federal law were raised "at the outset," the exercise of jurisdiction by the district court as directed by the Fifth Circuit

would not exceed Art. III limitations under the rule stated in *Haley*.

## CONCLUSION

As set forth herein, the question presented is answered by the settled precedents of this Court. The petition for writ of certiorari does not warrant this Court's attention, and should be denied.

Respectfully submitted,

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Dated: April 19, 2010.

# APPENDIX A

## OFFICE OF THRIFT SUPERVISION

Receivership Of A Federal Savings Association

Date: September 27, 2007
Order No.: 2007-43
OTS No.: 8475

The Director of the Office of Thrift Supervision (OTS), or his designee, in cooperation with the Federal Deposit Insurance Corporation (FDIC), has determined to appoint the FDIC as receiver of NetBank, Alpharetta, Georgia (Savings Bank).

## GROUNDS FOR APPOINTMENT OF FDIC AS RECEIVER FOR THE SAVINGS BANK

The Director, or his designee, has considered a September 27, 2007, memorandum and attachments, a resolution by the Savings Bank's board of directors consenting to the appointment of a conservator or receiver, Thrift Financial Reports filed by the Savings Bank from 2005 through 2007, and other information and finds and determines the following:

(i) The Savings Bank is in an unsafe and unsound condition to transact business;

(ii) The Savings Bank has incurred losses that have depleted substantially all of its equity capital, and there is no reasonable prospect for the Savings Bank to become adequately capitalized without Federal assistance;

(iii) The Savings Bank has consented to the appointment of a conservator or receiver;

(iv) The Savings Bank is undercapitalized as defined in section 38(b) of the Federal Deposit Insurance Act (FDIA) and has no reasonable prospect of becoming adequately capitalized, and has failed to submit an acceptable capital restoration plan within the time prescribed by 12 C.F.R. § 565.5(a); and

(v) The Savings Bank has substantially insufficient capital.

The Savings Bank is a Federally chartered savings bank, the accounts of which are insured by the Deposit Insurance Fund (DIF). The Savings Bank has its home office in Alpharetta, Georgia. As of June 30, 2007, the Savings Bank reported total assets of $2.474 billion.

## DISCUSSION OF GROUNDS FOR APPOINTMENT OF A RECEIVER FOR THE SAVINGS BANK

Section 5(d)(2)(A) of the Home Owners' Loan Act (HOLA), 12 U.S.C. § 1464(d)(2)(A), provides that the Director may appoint a receiver for any insured savings association if the Director determines that one or more grounds specified in section 11(c)(5) of the FDIA, 12 U.S.C. § 1821(c)(5), exist.

Under section 11(c)(5)(C) of the FDIA, the Director may appoint a receiver if a savings association is in

an unsafe and unsound condition to transact business. The Director finds that the Savings Bank is in an unsafe and unsound condition due to its capital deficiency, lack of core profitability, extreme vulnerability to market risk, and very poor asset quality. Over the past two years the Savings Bank has experienced significant losses due in part to required provisions for the allowance for loan losses, asset valuation adjustments and write-downs, and operating losses. These losses have significantly depleted capital resulting in the Savings Bank being significantly undercapitalized. Further, certain of the Savings Bank's mortgage and loan servicing portfolios have declined significantly in value and have resulted in write-downs. Such write-downs have substantially depleted capital. Additional declinations in asset values are likely, thereby, further depleting capital and jeopardizing the Savings Bank's operations.

In addition, the Savings Bank lacks core profitability and it's operations are extremely vulnerable to market risk due to significantly decreased demand for sub-prime mortgages and the Savings Bank has experienced a flattening yield curve and interest rate compression. The narrowing interest rate spread, when combined with the relatively higher general and administrative expenses of the Savings Bank, has resulted in losses on core operations during the past two years. The Savings Bank has been unable to reverse these trends. Moreover, the Savings Bank has ceased to operate some businesses and would have significant difficulty reviving those operations. The

Savings Bank's earning capacity is insufficient to replenish capital to the required regulatory levels in the foreseeable future. Therefore, the Director concludes that the Savings Bank is in an unsafe and unsound condition.

Under section 11(c)(5)(G) of the FDIA, the Director may appoint a receiver if a savings association has incurred, or is likely to incur, losses that have or will deplete all or substantially all of its capital, and there is no reasonable prospect for it to become adequately capitalized, as defined in section 12 U.S.C. § 1831c(b), without Federal assistance. The Savings Bank already has incurred losses that have depleted substantially all of its capital. As a result of the losses already suffered, the Savings Bank currently has insufficient capital. The Director has determined that (i) the Savings Bank will likely continue to suffer additional losses, in part because its assets are likely to continue to decline in value, it has a high level of general and administrative expenses, and it is experiencing narrowing interest rate spreads; (ii) the Savings Bank's holding company does not have, and has been unable to access, the funds necessary to recapitalize the Savings Bank; (iii) a proposed transaction to sell the Savings Bank has failed to materialize and no other potential acquirers presently exist; and (iv) the Savings Bank has withdrawn its plan to restore its capital. Therefore, the Director concludes that it is unlikely that any reasonable proposal to recapitalize the Savings Bank will be forthcoming from the Savings Bank, its holding

company or a third party. Therefore, the Director concludes that the Savings Bank has incurred losses that depleted substantially all of its capital and is likely to incur further losses, and there is no reasonable prospect for it to become adequately capitalized, as defined in section 12 U.S.C. § 1831c(b), without Federal Assistance.

The Director finds that the board of directors of the Savings Bank by resolution dated September 26, 2007, consented to the appointment of a conservator or receiver by the Director and the Savings Bank entered into a consent agreement with OTS for such an appointment. Under Section 11(c)(5)(I) of the FDIA, that resolution by the board of directors provides a sufficient grounds [sic] for the appointment of a receiver.

Under section 11(c)(5)(K) of the FDIA, the Director may appoint a receiver if a savings association is undercapitalized as defined in 12 U.S.C. § 1831c(b) and has no reasonable prospect of becoming adequately capitalized or fails to submit a capital restoration plan under 12 U.S.C. § 1831c(e)(2). Under section 1831c(b) an institution is undercapitalized if it fails to meet any required minimum capital level. OTS has determined that an institution is significantly undercapitalized if it has a leverage ratio that is less than three percent or a total risk-based capital ratio that is less than six percent. The Savings Bank has a leverage (core) capital ratio of 2.55 percent and a total risk-based capital ratio of 4.42 percent.

As discussed above, there is no reasonable prospect of the Savings Bank becoming adequately capitalized without Federal Assistance. Therefore, the Director concludes that the Savings Bank is undercapitalized and that it has no reasonable prospect of becoming adequately capitalized. In addition, the Savings Bank has withdrawn the capital restoration plan it had submitted to OTS effectively negating that submission. Therefore, the Director also concludes that the Savings Bank has failed to submit a capital restoration plan within the time prescribed in 12 C.F.R. § 565.5(a).

Under section 11(c)(5)(L)(ii) of the FDIA, the Director may appoint a receiver if a savings association has substantially insufficient capital. Pursuant to the authority granted in sections 5(t)(1)(A)(i) and 5(f)(2)(A) of the HOLA, the Director has promalgated 12 C.F.R. § 567.8(b) requiring all savings associations that are not "one" rated to maintain a leverage capital ratio of 4 percent. The Director concludes that failure to maintain at least two thirds of the leverage capital required by section 567.8(b) of OTS's regulations constitutes a substantial capital insufficiency within the meaning of the FDIA. The Savings Bank is not "one" rated and has a leverage capital ratio of only 2.55 percent. Therefore, the Director concludes that the Savings Bank has substantially insufficient capital. In addition, section 5(t)(2)(C) of the HOLA provides that OTS must require each savings association to maintain risk-based capital. OTS has prescribed that the minimum risk-based capital

amount must be 8 percent of the Institution's risk-based assets, as defined. The Director has concluded that failure to maintain at least two thirds of the risk-based capital required by section 567.2(a)(1) of OTS's regulations constitutes a substantial capital insufficiency within the meaning of the FDIA. The Savings Bank's risk-based capital is 4.42 percent. Thus, the Director concludes that the Savings Bank has substantially insufficient capital.

The Director, or his designee, therefore, has determined that grounds for the appointment for a receiver for the Savings Bank exist under section 5(d)(2) of the HOLA, and sections 11(c)(5)(C), (G), (I), (K) and (L) (ii) of the FDIA, 12 U.S.C. §§ 1821(c)(5)(C), (G), (I), (K) and (L)(ii).

## ACTIONS ORDERED OR APPROVED

### Appointment of a Receiver

The Director, or his designee, hereby appoints the FDIC as receiver for the Savings Bank, for the purpose of liquidation, pursuant to section 5(d)(2) of the HOLA, and section 11(c)(6)(B) of the FDIA.

### Delegation of Authority to Act for OTS

The Director, or his designee, hereby authorizes the OTS Southeast Regional Director, or his designee, and/or the Deputy Chief Counsel for Business Transactions, or his designee, to: (i) certify orders; (ii) sign, execute, attest, or certify other documents of

OTS issued or authorized by this Order; (iii) deliver or accept delivery of any notice from or to OTS regarding the Savings Bank; and (iv) perform such other functions of OTS necessary or appropriate for the implementation of such Order. All documents to be issued under the authority of this Order must be first approved, in form and content, by the Chief Counsel's Office. In addition, the director, or his designee, hereby authorizes the Deputy Chief Counsel for Business Transactions, or his designee, to make any subsequent technical corrections, that might be necessary, to this Order, or any documents issued under the authority of this Order.

By Order of the Director of OTS, effective when a copy of this Order is delivered to the Savings Bank.

s/ Scott M. Polakoff
Scott M. Polakoff
Senior Deputy Director and
Chief Operating Officer

## APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF
MISSISSIPPI JACKSON DIVISION

GLENN ALLEN ADAIR d/b/a
SUPER D #229, et al.

PLAINTIFFS

v.

CIVIL ACTION Nos.
3:07CV608TSL-JCS

AMERUS LEASING, INC., et al.

DEFENDANTS

**MOTION TO DISMISS FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR NETBANK**

Come now all Plaintiffs and move the Court to dismiss the Federal Deposit Insurance Corporation ("FDIC"), as Receiver for NetBank who was the successor to Republic Leasing, Inc., from this action. Plaintiffs would show the Court as follows:

1. Plaintiffs commenced this action in February 1996 in the Circuit Court of Hinds County, Mississippi. Republic Leasing Company, Inc. ("Republic") was one of the defendants named in the original complaint. Since that time, Republic was purchased by, and became a division of, NetBank. In September 2007, FDIC was appointed as Receiver of NetBank. FDIC then removed this entire action to this Court

pursuant to 12 USC §1819 (b)(2)(A) and 28 USC §1331.

2. According to information published by the FDIC, the assets of NetBank are not sufficient to cover the uninsured deposits of the depositors of NetBank. According to federal law, the claims of NetBank depositors have priority over the claims of the Plaintiffs. Since as a practical matter there is no real possibility that Plaintiffs will be able to collect on any judgment they might obtain against FDIC, Plaintiffs desire to dismiss FDIC, as Receiver for NetBank, from this action pursuant to Fed. R. Civ. P. 41(a)(2).

WHEREFORE, PREMISES CONSIDERED, Plaintiffs pray that the Court will enter an order dismissing all claims asserted against FDIC, as receiver for NetBank, in this action pursuant to Fed. R. Civ. P. 41(a)(2).

Respectfully submitted,

By: s/ Paul N. Davis
Paul N. Davis (MSB # 8638)
ATTORNEYS FOR PLAINTIFFS

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## CERTIFICATE OF SERVICE

I, Paul N. Davis, one of the attorneys for Plaintiffs, do hereby certify that I have this day filed the foregoing with the Clerk of the Court using the Court's ECF system which sent notification of such filing to all registered ECF participants. I further certify that I have this day served a true and correct copy of the above and foregoing instrument by United States Mail, postage fully prepaid, to the following:

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SO CERTIFIED, this the 11th day of January, 2008.

s/ Paul N. Davis
PAUL N. DAVIS

## APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF
MISSISSIPPI JACKSON DIVISION

GLENN ALLEN ADAIR DBA SUPER D 229; VICKIE S. ELLINGTON D/B/A ATTALA DISCOUNT DRUGS; RAWLS DRUG CO., INC.; JOE RAY BOURN D/B/A THE DRUG STORE; DELTA PHARMACY INC. D/B/A LEE PHARMACY; WAYNESBORO ANIMAL CLINIC, INC.; SERVICE REXALL DRUGS, INC.; DALLAS LITTLE, JR., D/B/A LITTLE'S PHARMACY; SOUTHERN DISCOUNT DRUGS OF CHARLESTON, D/B/A SOUTHERN DISCOUNT DRUGS/ROBERT L. SALMON; MAY'S PHARMACY D/B/A COLDWATER PHARMACY /JAMES A. MAY; ANIMAL MEDICAL CENTER OF ELLISVILLE, INC./KIMBERLY A. MARTIN; BAKER'S PHARMACY, INC./ED L. BAKER; BEACH PHARMACY, INC.; JOHN T. HALL, D/B/A MCDUFFIE DRUG CO.; HENDERSON DRUG, INC.; CHARLES BOGGAN, DECATUR DRUGS, INC DBA

CASE NO.
3:07cv608DPJ-JCS

WHEELER DRUG STORE; BILLIE JAMES BONNER DBA BONNER PHARMACY; RANDY CALVERT; BRENT'S DRUGS INC.; DWIGHT G. CARR DBA CARR'S DISCOUNT DRUGS; KENNY G. COLEMAN DBA COLEMAN'S HEALTH MART PHARMACY; MICHAEL E. DURAN; NANA'S INC.; JAMES E. GABLE; SOUTHERN DRUG STORE, INC. DBA SOUTHERN DRUG; RICHARD HUNT; MR. DISCOUNT DRUGS OF FOREST, INC.; JAMES J. JELKS, JR. DBA CENTREVILLE DRUGS; DONALD G. KITCHENS; WILSON DRUG COMPANY OF CORINTH, INC. FORMERLY DBA KITCHENS DRUG CO.; TIMOTHY L. LIDDY DBA SUPER D DRUGS #216; ROBERT L. MAYS DBA RIPLEY DRUG COMPANY; SUPER SAV-ON DRUGS OF AMERICA, INC.; WILLIAM BELL/CITY DRUG STORE; JIM BAIN/JIM BAIN'S PHARMACY; CHARLES BEST; ANN DEVOE/GATHRIGHT-REED DRUG COMPANY, INC.; JAMES A. MAY/MAY'S PHARMACY, INC.; LARRY

MELTON; SUPER SAVE ON
DRUGS OF AMERICA, INC.

PLAINTIFFS

vs.

FEDERAL DEPOSIT
INSURANCE CORPORATION,
AS RECEIVER FOR
NETBANK; REGIONS BANK,
AS SUCCESSOR TO
WHITEVILLE BANK, FIRST
COMMERCIAL BANK OF
MEMPHIS (F/K/A UNITED
AMERICAN BANK) AND
ST. JAMES BANK AND
TRUST; LEASE PARTNERS,
INC.; FIRST BANK RICHMOND;
BANCORPSOUTH BANK;
ALEX BIDEZ; BUEL H.
HUMPHREYS; THOMAS M.
KIDD; RONALD K. LARUE;
LONGWATER FUNDING
RESOURCES, INC.; AND
C. MAX TULLOS, JR.

DEFENDANTS

**AMENDED NOTICE OF REMOVAL**

FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver for NetBank, files this Amended Notice of Removal – *amending to list the remaining plaintiffs and defendants (and only those parties) and to correctly list exhibits* – pursuant to *12 U.S.C. Sections 1819(b)(2)(B) and 1823(e) and 12 U.S.C.*

*Sections 85 and 86 and 1831d(a)* and respectfully shows the Court the following:

1. The Federal Deposit Insurance Corporation ("FDIC") is a corporation duly authorized and organized under the laws of the United States of America [*12 U.S.C. Section 1811, et seq.*].

2. On September 14, 1998, a First Amended Complaint in the action captioned *Glenn Allen Adair, et al. v. Amerus Leasing, Inc., et al.*, was filed in the MDL proceedings in the United States District Court, Middle District of Florida, Tampa Division. This action was pending in the Circuit Court of the First Judicial District of Hinds County, Mississippi ("Circuit Court"), Civil Action No. 252-96-147. A copy of the First Amended Complaint was attached to the Notice of Removal (though not referenced therein) as Exhibit A and is incorporated herein. The caption in this Amended Notice lists only the plaintiffs and defendants who remained as parties, to the FDIC's knowledge, at the time of removal.

3. On September 27, 2007, the Office of Thrift Supervision appointed the FDIC as Receiver of NetBank.

4. On September 28, 2007, the FDIC accepted the appointment and took control of NetBank, as Receiver. (True and correct copies of the Appointment documents are referenced in the original Notice as Exhibit A and are attached hereto as Exhibit A-1.)

5. By orders of October 8, 2007, the Circuit Court entered orders substituting the FDIC as a real party (defendant) in interest in this case (see

Exhibit B to the original Notice, incorporated herein) and staying the case for 90 days.

6. Pursuant to *12 U.S.C. Section 1819(b)(2)(A)*, all suits of a civil nature to which the FDIC, in any capacity, is a party are deemed to arise under the laws of the United States and the district courts have original jurisdiction thereof as provided under *28 U.S.C. Section 1331. 12 U.S.C. Sections 1823(e), 1831d(a)* and/or *12 U.S.C. Sections 85 and 86* and related statutes make alleged agreements enforceable only if in writing and preempt state law usury claims.

7. The Circuit Court of Hinds County, Mississippi is situated within this district and division, making venue in this Court proper under 28 U.S.C. Section 1441 (a).

8. A copy of the Notice of Removal was filed with this court on October 12 (On page 2 it incorrectly bore the date of October 10.) and was filed with the state court clerk and served upon all counsel of record that day. This Amended Notice of Removal is being served upon all counsel of record.

Dated: October 15, 2007.

Respectfully submitted,

FEDERAL DEPOSIT
INSURANCE CORPORATION

s/ Julianne Farnsworth

By: David W. Clark
One of its Attorneys

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## CERTIFICATE OF SERVICE

The undersigned, counsel for certain defendants, certify that I have this day mailed by United States Mail, postage prepaid, to all counsel of record a true and correct copy of the foregoing to the following addresses:

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**BancorpSouth Bank**

DATE: October 15, 2007

s/ Julianne Farnsworth by David W. Clark
JULIANNE FARNSWORTH
By: David W. Clark

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No. 09-1125

IN THE

# Supreme Court of the United States

GLENN ALLEN ADAIR d/b/a
SUPER D 229, *et al.*,
*Petitioners*,

v.

LEASE PARTNERS, INC., *et al.*,
*Respondents*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

## REPLY TO RESPONDENT'S OPPOSITION

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IN THE

# Supreme Court of the United States

No. 09-1125

GLENN ALLEN ADAIR d/b/a
SUPER D 229, *et al.*,
*Petitioners,*

v.

LEASE PARTNERS, INC., *et al.*,
*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

## REPLY TO RESPONDENT'S OPPOSITION

## REPLY ARGUMENT

1. Pursuant to Rule 10(a), a writ of certiorari should be issued because Respondents openly admit that *New Rock Asset Partners, L.P. v. Preferred Entity Advancements, Inc.*, 101 F.3d 1492, 1497-1511 (3rd Cir. 1996) contains a "detailed analysis" which squarely conflicts with the Fifth Circuit's decision in this case. Indeed, *New Rock* provides a thorough examination of reasons why the "time of filing" doctrine does not apply and why only supplemental jurisdiction remained after the District Court below dismissed the FDIC. *Id.*

Respondents also admit that *Mizuna, Ltd. v. Crossland Federal Sav. Bank*, 90 F.3d 650, 657 (2nd Cir. 1996), *Myers v. Moore Engineering, Inc.*, 42 F.3d 452, 454 (8th Cir. 1994), *Bank of Oklahoma, N.A., Grove Branch v. Islands Marina, Ltd.*, 918 F.2d 1476, 1480 (10th Cir. 1990), and *Diehl v. F.D.I.C.*, 1994 WL 68239, 2 (9th Cir. 1994) conflict with the Fifth Circuit's decision in this case. Respondents attempt to downplay these decisions because they do not contain a "detailed analysis" of the discretionary remand issue. However, an equally appealing argument is that no detailed analysis is necessary because it is so patently obvious that there is no continuing federal interest after dismissal of the FDIC. Judge Jolly needed only one paragraph in his concurring opinion below to explain his view that remand is discretionary following dismissal of the FDIC. *See* Pet. App. at 15a.

2. Respondents also tacitly admit the importance of the issue presented here as one which is likely to keep re-occurring until this Court resolves the conflict. Respondents did not dispute the list of district court cases conflicting with the Fifth Circuit's decision, as footnoted in Petitioners' petition, that further demonstrates this point. Respondents were also unable to dispute the likelihood of numerous recurrences of the issue presented here in the future as the FDIC continues to take over failed institutions.

3. Petitioners have never disputed Respondents' argument that the intervention of the FDIC in this suit gave the District Court jurisdiction over the entire suit. 12 U.S.C. §1819(b)(2) plainly so provides. However, the fact that the statute declares that the FDIC's intervention made this entire "suit" "deemed to arise under the laws of the United States" does not

mean that Petitioner's individual state law claims against Respondents were somehow converted into federal law claims. Respondents argue to this Court the Fifth Circuit's two-fold holding that Petitioners' state law claims against parties unrelated to the FDIC arose under federal law on the date of removal and that the "time of filing" doctrine now precludes remand. However, the Fifth Circuit's holding, and thus Respondents' argument, squarely conflicts with one of this Court's carefully crafted holdings in *Osborn v. Haley*, 549 U.S. 225, 245, 127 S.Ct. 881, 896 (2007).

Osborn sued Haley, a U.S. government employee, in state court. Osborn also asserted state law claims against her own private employer and supervisor. The entire case was "deemed to be an action . . . against the United States" and was removed to federal court pursuant to 28 U.S.C. §2679(d)(2) which provides in part:

> Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed . . . to the district court of the United States . . . . *Such action or proceeding shall be deemed to be an action or proceeding brought against the United States* . . . . (emphasis added).

The district court remanded the case after rejecting the Attorney General's certification. In affirming the reversal of the district court's remand order because the issues involving the United States had not been finally adjudicated, this Court provided guidance to the district court for the conduct of future proceed-

ings in the case in making the following significant holding pertinent here:

> Because a significant federal question (whether Haley has Westfall Act immunity) would have been raised at the outset, the case would "aris[e] under" federal law, as that term is used in Article III. *See Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 493, 103 S.Ct. 1962, 76 L.Ed.2d 81 (1983). *Even if only state-law claims remained after resolution of the federal question, the District Court would have discretion, consistent with Article III, to retain jurisdiction. See Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350-351, 108 S.Ct. 614, 98 L.Ed.2d 720 (1988) (when federal character of removed case is eliminated while the case is *sub judice*, court has discretion to retain jurisdiction, to remand, or to dismiss);

*Haley*, 549 U.S. at 245, 127 S.Ct. at 896 (emphasis added).

This Court made it very clear that: (1) even though 28 U.S.C. §2679(d)(2) mandated that the entire case be deemed to be a suit against the United States and thus arise under federal law at the time of removal, the state law claims against Osborn's private employer and supervisor did not lose their state law character, and (2) if any of those state law claims were left to be resolved after final resolution of the federal question presented by the United States' presence in the suit, then the district court would have discretion to remand at that time. That is precisely the analogous situation that prompted the District Court below to remand this suit to state court after dismissal of the FDIC.

4. For at least two reasons Respondents have misplaced their reliance on *Brockman v. Merabank*, 40 F.3d 1013 (9th Cir. 1994), *Buchner v. F.D.I.C.*, 981 F.2d 816 (5th Cir. 1993), *Matter of Meyerland Co.*, 960 F.2d 512 (5th Cir. 1992), *Federal Sav. & Loan Ins. Corp. v. Griffin*, 935 F.2d 691 (5th Cir. 1991), *Spring Garden Associates, L.P. v. Resolution Trust Corp.*, 26 F.3d 412 (3rd Cir. 1994), and *Kansas Public Employees Retirement System v. Reimer & Koger Associates, Inc.*, 77 F.3d 1063 (8th Cir. 1996). First, these cases are very different from the instant suit because they involve the situation where either the FDIC (or RTC, as the case may be) or its successor has not been dismissed and thus remains as a party. Second, to the extent any of these cases could be construed to support Respondents' position, they clearly conflict with this Court's subsequent decision in *Haley*.

5. There are several additional faults with Respondents' argument that the "time of filing" doctrine applies and provides continuing jurisdiction over all of Petitioners' purely state law claims against Respondents. The issue presented here is not whether the District Court continues to have jurisdiction after the FDIC was dismissed. Both the District Court and Petitioners acknowledge that the dismissal of the FDIC did not strip the court of jurisdiction. Thus, Petitioners have never argued that the District Court was *required* to remand. Just as in *Carnegie-Mellon University v. Cohill*, 484 U.S. 343, 348, 108 S.Ct. 614, 618 (1988), the real question now is whether the District Court had *discretion* to remand since all federal interests giving rise to original removal jurisdiction have now dropped out of the case. *Cohill* squarely decided this issue in the affirmative. More recently, *Haley* reaffirmed *Cohill* in

construing 28 U.S.C. §2679(d)(2), a statute that declared an entire suit would be deemed to be against the United States on the date of removal. Hence, Petitioners request a writ of certiorari.

Respondents' argument assumes, without any discussion, a *fiction* that after dismissal of the FDIC there is any real federal interest whatsoever in purely state law claims against parties not affiliated in any manner with the FDIC. Respondents' opposition is entirely silent on this critical issue. It cannot be disputed that the only federal interest in this suit was the short-lived presence of the FDIC as a party.[1] Congress chose not to address the District Court's options under 12 U.S.C. §1819(b)(2) when the FDIC no longer "is a party." This Court addressed an analogous situation in *Cohill* and squarely held that the District Court has discretion to remand in cases where all federal interests have dropped out of the case.

The previous decisions of this Court cited by Respondents demonstrate that the "time of filing" doctrine has been developed principally in the context of diversity cases. Those decisions clearly were founded on well-reasoned principles designed to accomplish important purposes such as to protect against manipulation of a district court's jurisdiction once it has attached or to protect against a loss of jurisdiction after a case has substantially progressed in federal court. Respondents do not suggest that any such issues are present in this suit. Respondents failed to offer this Court any justification, much less

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[1] Petitioners have previously addressed the federally preempted usury claims in this suit that were non-removable, but that in any event are subject to a pending motion to be dismissed with prejudice.

a rational justification, for imposing a "feat of alchemy" (in Judge Jolly's words)[2] to permanently transform purely state law claims into federal claims merely because of the entry, and prompt dismissal, of the FDIC as a party after more than eleven years of litigation.

Respondents' reliance on the "time of filing" as addressed in *Kansas Public Employees Retirement System v. Reimer & Koger Associates, Inc.*, 77 F.3d 1063, 1066-1067 (8th Cir. 1996), *Casey v. F.D.I.C.*, 583 F.3d 586 (8th Cir. 2009) and *F.D.I.C. v. Four Star Holding Co.*, 178 F.3d 97 (2nd Cir. 1999) is misplaced. Respondents use these decisions to leap into the argument that the District Court had no discretion to remand this suit. In *KPERS*, the court applied the "time of filing" doctrine to conclude that the district court had jurisdiction over state law claims after the RTC was dismissed from an earlier suit. However, the court expressly found that it did not need to decide "the propriety of the district court's decision to retain supplemental jurisdiction," *i.e.*, whether the district court had discretion to remand if it had so chosen. *KPERS*, 77 F.3d at 1068. In *Casey*, the court likewise applied the "time of filing" doctrine only to find that the district court retained jurisdiction after the dismissal of the FDIC. While the court "questioned" whether there is discretion to remand following dismissal of the FDIC, the court's only holding on this issue was that if discretion was accepted as the standard, then discretionary remand would still not be appropriate in that particular case. *Casey*, 583 F.3d at 591-592. *Four Star* was a case filed by the FDIC in federal court. Discretionary remand was not even an issue in the case. The

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[2] *See* Judge Jolly's characterization, Pet. App. at 15a.

appeals court merely held that the district court did not lose jurisdiction because the FDIC was dismissed after being substituted as plaintiff by a third party to whom the FDIC had transferred its interests. Unlike *Four Star*, no party remaining here in *Adair* ever had any connection whatsoever with the FDIC. Moreover, the issue here is not whether the District Court below has lost its jurisdiction, but rather is whether the District Court now has discretion to remand the remaining state law claims.

6. Respondents are wrong in asserting that Petitioner's Article III argument was not brought to the attention of the Fifth Circuit. It is true that in their briefing to the Fifth Circuit, Petitioners did not expressly state that the Fifth Circuit's decision stretched beyond the jurisdictional limits of Article III. However, a couple points should be noted. First, both in a letter supplementing their brief and at oral argument, Petitioners did expressly tell the Fifth Circuit that they relied on the reasoning set forth in *New Rock Asset Partners, L.P. v. Preferred Entity Advancements, Inc.*, 101 F.3d 1492 (3rd Cir. 1996). The *New Rock* Court explained that part of the reasoning supporting Petitioners' position was in fact "[t]he limited nature of federal jurisdiction." 101 F.3d at 1502. Petitioners' Article III argument presented here is taken directly from the analysis in *New Rock* which discussed at some length this Court's decision in *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 115 S.Ct. 2227, 132 L.Ed.2d 375 (1995), including the following reference to *Lamagno*:

> Justice Souter dissented, joined by three other Justices, *reasoning in part that "requiring" a federal court to keep jurisdiction over the case after the United States was no longer a party*

> *"must at least approach the limit [of 'arising under' jurisdiction under Article III], if it does not cross the line."* (emphasis added).

*New Rock*, 101 F.3d at 1506. That is precisely the argument that Petitioners present here. Petitioners fairly presented this reasoning to the Fifth Circuit by referring the Court to *New Rock*.

Second, this Court's holding in *Osborn v. Haley*, quoted on page 4, above, should control this case regardless whether this Court considers *Haley* solely in the context of its conflict with the jurisdictional and "time of filing" holdings announced by the Fifth Circuit and now argued by Respondents, or whether this Court also chooses to consider Petitioners' additional argument that *Haley* supports the proposition that it would exceed the limits of Article III to interpret 12 U.S.C. §1819 as *requiring* the District Court to exercise jurisdiction over state law claims following dismissal of the FDIC.

## CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the Fifth Circuit Court of Appeals.

Respectfully submitted,

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